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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

FAX.COM, INC.,

Petitioner,

v.

STATE OF MISSOURI EX REL. NIXON,
ATTORNEY GENERAL, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the federal Telephone Consumer Protection Act's ban of all unsolicited fax advertising violate the First Amendment?

PARTIES TO THE PROCEEDING

The petitioner is Fax.com, Inc. The respondents are the State of Missouri, *ex rel.* Jeremiah W. (Jay) Nixon, Attorney General, and the United States of America.

RULE 29.6 STATEMENT

Fax.com, Inc. does not have a parent company, nor does any publicly held company own 10% or more of Fax.com Inc.'s stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 323 F.3d 649, the opinion of the district court (Pet. App. 19a-42a) is reported at 196 F. Supp. 2d 920, and the decision of district court adopting *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), as the applicable standard (Pet. App. 43a.) is unreported.

JURISDICTION

On March 21, 2003, the court of appeals issued its decision on the merits in this case. On July 3, 2003, the court of appeals denied petitioner's motion for panel rehearing or rehearing *en banc*. *See* Pet. App. 1a. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law . . . abridging the freedom of speech."

The Telephone Consumer Protection Act of 1991, codified at 47 U.S.C. § 227, states in relevant part:

> "It shall be unlawful for any person . . . to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." § 227(b)(1)(C).
>
> "The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." § 227(a)(4).

STATEMENT

In recent years, Congress and numerous State legislatures have enacted diverse and increasingly severe limitations on emerging communication technologies, including e-mail, faxing, and wireless communication. Many of these laws limit unsolicited advertisements. In this case, however, the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), and its blanket restriction of unsolicited fax advertising goes one step further. The TCPA prohibits the transmission of *any* fax advertisement without the prior express invitation or permission of the recipient. This prior consent burden is so onerous that the district court, in ruling that the TCPA violated the First Amendment, regarded the TCPA "for all practical purposes" as "a complete ban on facsimile advertising." Pet. App. 41a n.26.

Though the Eighth Circuit reversed the district court, its decision "conflicts with relevant decisions of the Court," Sup. Ct. R. 10(c), and adds to the confusion among the lower courts. To uphold the TCPA's content-based restriction, the court below repeatedly distinguished "cases in which the Supreme Court recently struck down restrictions on commercial speech." Pet App. 16a. Because the outcome of this case presages the fate of commercial speech across an array of emerging communication technologies, and because the decision below may be a harbinger for Congress and various state legislatures to extend the TCPA's crippling speech restrictions to those technologies, this case cries out for review.

And that review cannot come soon enough. While the actual cost of receiving a fax may only be a half-cent per page, Pet. App. at 32a n.18, the TCPA's disproportionate damage awards have spawned a new class action cottage industry. *See infra.* at 26. A single fax, if sent to enough people, can threaten a multi-million dollar judgment and force a business into bankruptcy. *Id.* These businesses have little choice but to pull the plug on fax advertising, effectively silencing an entire means of commercial speech.

I. The Telephone Consumer Protection Act.

In 1991, Congress passed the TCPA in response to public concern over the growing number of unwanted telephone solicitations. The Act addressed these concerns by prohibiting certain telemarketing practices and authorizing the regulation of such practices by the FCC.

With little fanfare or inquiry, Congress also imposed restrictions on fax advertising. Under the TCPA, it is unlawful for any person "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine...." *See* 47 U.S.C. § 227(b)(1)(C). The TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *See* 47 U.S.C. § 227(a)(4). Absent that "permission," transmitting any commercial fax advertisement violates the Act. *Id.* And unlike the rules for telephone solicitations, there is no "first fax" exception, nor is there an exemption for contacting parties with an existing business relationship. *See* FCC Report and Order, FCC-03-153 (July 3, 2003) at 113, ¶ 189.

The TCPA provides several enforcement mechanisms. As demonstrated by this action, State attorneys general may bring lawsuits in federal court on behalf of the State's residents. *See* 47 U.S.C. § 227(f)(1). In addition, a person may bring a TCPA action in state court. Such actions, whether brought by a State attorney general or by an individual, may seek both injunctive relief and a $500 award for each unsolicited fax advertisement received. *See* 47 U.S.C. §§ 227(b)(3) and (f). If the defendant "willfully or knowingly" violated the Act, the award may increase to $1,500 for a single violation. *See id.* Finally, the FCC may order forfeitures in the maximum amount of $11,000 *per violation* of the Act. *See* 47 U.S.C. § 503(b)(2)(C); 15 FCC Rcd 18221 (Sept. 14, 2000).

II. Case History.

The State of Missouri brought this suit against Fax.com in August 2000, alleging that Fax.com violated the TCPA by faxing unsolicited advertisements to recipients in Missouri.[1] Missouri sought $1,500 in damages per fax and an injunction prohibiting future unsolicited fax advertisements. Fax.com moved to dismiss the suit, arguing that the TCPA's fax ban violated the First Amendment.[2] The United States intervened and defended the fax ban in a two-day evidentiary hearing held in July 2001. After considering the evidence and post-hearing briefs, the district court on March 13, 2002, entered judgment in favor of Fax.com, ruling that the TCPA's ban on unsolicited fax advertisements violates the First Amendment. *See* Pet. App. 19a.

Although petitioner maintained that strict scrutiny should apply in this case, the district court rejected that argument in favor of the four-part test of *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Pet. App. 43a. Applying that test, the district court found that the government had not satisfied its burden on *any* of the *Central Hudson* requirements. To start, the government's claim of a substantial interest in preventing truthful fax advertisers from shifting costs to recipients or tying up recipients' fax machines, was not supported by the record. *Id.* at 32-34a . Nor did the record show that the TCPA's ban on fax advertising would "directly advance[]" the government's interest when it ignored so much of the harm:

> The TCPA does not ban all unsolicited faxes but rather only advertisements. Therefore, recipients can still bear the costs of printing others' messages, even if they strongly oppose the messages' content.

---

[1] This suit was consolidated with an earlier suit brought by Missouri against American Blast Fax, Inc., which has since gone out of business.

[2] The motion was later converted into a motion for summary judgment.

Pet App. 37a. Thus, "[t]here is no rationality behind the government's distinction between unsolicited advertisements and other unsolicited faxes." *Id.* at 40a.

Moreover, the district court identified "a variety of alternatives, including a national 'no-fax' database similar to those being utilized for telephone solicitations" that "would promote the government's interest, and yet be less intrusive to First Amendment rights." *Id.* at 39a. Indeed, "[m]any states have looked at this problem and found less restrictive means than a complete ban on unsolicited fax advertisements." *Id.* Thus, the government failed "to show that the regulations are no more extensive than is necessary to serve the government's interests." *Id.* at 41a.

Despite this record, the Eighth Circuit reversed and upheld the TCPA's fax advertising ban under *Central Hudson*. Although recognizing that the "[t]he harm associated with unsolicited fax advertisements is . . . not related to the content of the messages," the Eighth Circuit rejected the district court's conclusion that the Act impermissibly singled out commercial faxes. Pet. App. 17a. In doing so, the Eighth Circuit was obliged to distinguish "different characteristics" of "cases in which the Supreme Court has recently struck down restrictions on commercial speech." *Id.* at 16a (citing *Western States*, *Lorillard*, and *44 Liquormart*, *infra*.). The Eighth Circuit also dismissed numerous alternatives to the TCPA (such as a "first fax" exception, a "do not fax" list, or limits on the length and frequency of faxes), not by disputing whether these alternatives were less intrusive while still serving the government's interest, but instead by reiterating that intermediate scrutiny does not require the least restrictive means. Pet. App. 14-15a. As a result, the Eighth Circuit acknowledged that "the effect of the TCPA will be that some consumers will not receive unsolicited advertisements they might have appreciated." *Id.* at 15a.

The Eighth Circuit denied rehearing *en banc* and this petition followed.

REASONS FOR GRANTING THE WRIT

Because the Eighth Circuit's decision conflicts with the Court's precedents, today's important question of federal law warrants review. *See* Sup. Ct. R. 10(c). If left undisturbed, the decision below will be a key authority for the many lower courts and legislatures analyzing the ever-expanding government restrictions on technology-driven speech.

Unfortunately, the Eighth Circuit's decision strays far from the path paved by this Court. By giving different treatment to commercial and noncommercial faxes – despite their identical impact on cost-shifting and a recipient's fax line – the decision conflicts with *Cincinnati v. Discovery Network*, 507 U.S. 410, 424 (1993), and other decisions teaching that restrictions targeting commercial speech must be reasonably related to the government's interests. By brushing aside numerous alternatives that would address the government's concerns without imposing what the trial court described as a "complete ban" on fax advertising, the decision conflicts with *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002), and other decisions teaching that "if the Government could achieve its interests in a manner that . . . restricts less speech, the Government must do so." And by failing to recognize the First Amendment problems inherent in requiring the "prior express invitation or permission" from the fax recipient, *see* 47 U.S.C. § 227(a)(4), the decision conflicts with this Court's prior-consent-to-speak cases, *infra* at 17, which make clear that the Government cannot require a recipient to make an affirmative request for speech.

The decision below also adds to the growing confusion among the lower courts on both the proper treatment of arguably underinclusive commercial speech restrictions and the analysis of less restrictive alternatives. If left undisturbed, the Eighth Circuit's decision will sow further uncertainty among lower courts, and it will reap a bitter harvest for national commerce dependant upon the "indispensable" and "free flow of commercial information."

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748, 765 (1976).

The Court should also grant review to address the continuing applicability and scope of *Central Hudson*. As several members of this Court have noted in different contexts, the balancing test set forth in that case provides insufficient protection for truthful, non-misleading commercial speech. Indeed, in *Discovery Network*, this Court expressly reserved the question of whether *Central Hudson* or strict scrutiny should apply to a content-based commercial speech restriction that, like the TCPA's fax restrictions, is justified solely by concerns about the medium of communication. This case provides an excellent opportunity to resolve that open question.

I. The Eighth Circuit's Decision Is Inconsistent With This Court's Precedents And Contributes To Confusion Among The Lower Courts.

In analyzing the constitutionality of the TCPA's fax restrictions, both lower courts applied the framework of *Central Hudson,* 447 U.S. at 566, but with very different results. Under *Central Hudson*, where, like here, the expression concerns lawful activity and is not misleading, a speech restriction is permitted only if the asserted government interest is substantial; the regulation "directly advances" the interest; and the regulation is "not more extensive than necessary to serve that interest." 447 U.S. at 591. The district court concluded that none of these standards were met. The Court of Appeals took precisely the opposite view, and held that each of the requirements were satisfied. That conclusion conflicts with this Court's precedents and contributes to confusion among the lower courts in the analysis of commercial speech restrictions.

A. The Eighth Circuit's Decision Conflicts With *Discovery Network* And Other Decisions Teaching That Restrictions On Commercial Speech May Not Draw Distinctions Unrelated To The Government's Asserted Interest.

Central Hudson's third and fourth prongs, taken together, "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (quotation omitted). To sustain a speech restriction, there must be a "reasonable fit" between the government's ends and the means chosen to address them. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001).

Numerous decisions of this Court make clear that a speech restriction will not satisfy these requirements if it draws distinctions in a manner that has no reasonable relationship to the government's claimed interest. In *Rubin*, the Court concluded that given the Government's claimed interest in preventing "strength wars," the challenged statute's differing approaches to the display of alcohol content in beer labels, beer advertising, and wine and spirit labels made "no rational sense." *Id.* Similarly, in *Greater New Orleans Broadcasting Assoc. v. United States*, 527 U.S. 173 (1999), the Court struck down an FCC regulation that prohibited radio and television advertising of commercial casino gambling, but not tribal or Government-owned casinos. The Court concluded that "the Government present[ed] no sound reason why such lines bear any meaningful relationship" to the Government's claimed interest in alleviating the social costs of casino gambling. *Id.* at 193.

The same principles underlie *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). In *Discovery Network*, Cincinnati cited safety and aesthetic concerns in banning distribution of commercial publications from newsracks, but imposed no similar ban on "regular" newspapers. This Court struck the ordinance as lacking a reasonable fit with the

stated interests, since noncommercial newsracks posed the same concerns but were not banned.

Discovery Network stands for the proposition that the fact that speech is "commercial" in nature cannot be used as the excuse to restrict it where the speech's commercial nature is unrelated to the problem sought to be solved. The Court explained that the Cincinnati ordinance made the mistake of "attach[ing] more importance to the distinction between commercial and noncommercial speech than [the] cases warrant and seriously underestimat[ing] the value of commercial speech." *Id.* at 419. The distinction made between commercial and noncommercial newsracks bore "no relationship *whatsoever* to the particular interests that the city has asserted," 507 U.S. at 424, and the required "reasonable fit" was lacking. *Id.*

Contrary to the decision below, *Discovery Network* controls this case. The interests asserted by the government, protecting recipients from the costs of receiving unsolicited faxes and from having their fax lines tied up, cannot save this statute. As in *Discovery Network*, these interests involve only the means of distribution, *id.* at 426 n.21, not any harm related to commercial content, *id.* at 426. The government's stated interests thus might support restricting only the longest, and hence most costly, faxes, or only faxes sent during the busiest times of day. But they bear "no relationship *whatsoever*," to the TCPA's content-based distinction.

Critical to this analysis, the Act does not prohibit all unsolicited faxes, just those containing "an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). Unsolicited chain letters, charitable solicitations, surveys, prank faxes and, of course, campaign solicitations, may proceed freely. Thus, as the district court recognized, "there is no rationality behind the government's distinction between unsolicited advertisements and other unsolicited faxes." Pet. App. 40a.

The Eighth Circuit, to its credit, also acknowledged that the stated governmental interests related only to the means of

distribution, explaining that "Congress was not concerned with the effect of the content of the advertisements, but rather with the effect of communicating," and, further, that "[t]he harm associated with unsolicited fax advertisements is . . . not related to the content of the messages." Pet. App. 40a. Under *Discovery Network*, this should have invalidated the TCPA's artificial distinction between commercial and noncommercial faxes.

Instead of applying the clear teaching of *Discovery Network*, however, the Eighth Circuit sought to distinguish it. In doing so, the appeals court justified the TCPA's artificial distinction between commercial and noncommercial faxes by resorting to legislative history regarding *telemarketing*–not fax advertising, to fill gaps in its *Central Hudson* analysis:

> When Congress enacted the TCPA it found that 'non-commercial *calls* . . . are less intrusive to consumers because they are more expected.' H.R. Rep. No. 102-317, at 16 (1991). There is no reason to doubt that Congress also believed for the same reason that noncommercial faxes did not present the same problem as commercial faxes and therefore distinguished between them.

Pet. App. at 10a. After using one medium, telemarketing, to justify the regulation of another, faxing, the Eighth Circuit entirely ignored the less speech restrictive alternatives that govern telemarketing. Moreover, if non-commercial faxes "are more expected," making those faxes the primary cause of cost-shifting, then the entire rationale for restricting only commercial speech unravels. *Discovery Network*, 507 U.S. at 427 (criticizing "incremental support" for restriction).

'In all events, there are many reasons to doubt that Congress's conclusion that noncommercial *calls* are "more expected," and thus less intrusive, has any application to faxes. Faxes, unlike calls, are received primarily by businesses, where commercial communication is the norm. And as simple pieces of paper printed out on a machine,

faxes are more uniform than calls – one unwanted fax of a given length is no more "intrusive" than another. By disregarding these differences, and simply equating faxes with calls, the Eighth Circuit relied on "speculation and conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

Even apart from its factual accuracy, the court of appeals' discussion of the relative "intrusiveness" of commercial versus noncommercial faxes is simply inapt. This supposed "intrusion" has nothing to do with cost-shifting. Instead, the court of appeals' "intrusiveness" analysis relies on privacy-based interests appropriate to the residential setting where most phone calls are answered, not to the business setting where most faxes are received. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (noting "the unique nature of the home" in assessing privacy interests).

Without these justifications, what remains is a troubling attempt to justify a content-based speech restriction by citing the perceived unpopularity of the restricted speech. Pet. App. at 10a ("TCPA's distinction between commercial and noncommercial fax advertising is relevant to the goal of reducing the costs and interference associated with *unwanted* faxes.") Plainly, a content-based speech restriction founded on the Government's view of what type of speech the majority "wants," cannot be sustained. Indeed, "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *United States v. Eichman*, 496 U.S. 310, 318 (1990), and that principle fully applies to commercial speech. *Bolger v. Youngs Drug Prod. Co.*, 463 U.S. 60, 71-72 (1983). The lower court's attempt to distinguish *Discovery Network* via the "unwantedness" of commercial faxes is a reincarnation of *Discovery Network*'s rejected argument that commercial speech can be treated differently because it has low value.[3]

[3] The Eighth Circuit would surely not proffer its "unwantedness" rationale in the context of noncommercial speech – say, justifying a restriction of pro-labor faxes but not pro-management faxes on the

In the end, the appeals court failed to heed the teaching of *Discovery Network*, which makes clear that the government may not take a "limited" approach to a general problem by singling out commercial speech without a reason. 507 U.S. at 418-19 (goal of limiting the number of newsracks was "insufficient justification" for restricting commercial newsracks that were "no more harmful than the permitted newsracks"). As a result, the Eighth Circuit permitted precisely the sort of logically unfounded targeting of commercial speech that *Discovery Network* forbade.

B. The Decision Of The Eighth Circuit Conflicts With This Court's Decision In *Western States*.

1. The Eighth Circuit's Failure To Consider Numerous And Obvious Less Restrictive Alternatives Conflicts With *Western States*.

In its most recent decision on commercial speech, this Court reaffirmed *Central Hudson's* demand for narrow tailoring. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002). There, the Court explained, "we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Id.* at 371. The Court was particularly critical that there was no "explanation of why the Government believed forbidding advertising was a necessary as opposed to merely convenient means of achieving its interest." *Id.* at 373.

The TCPA suffers from the same defect. There is no evidence in the legislative history or elsewhere that Congress, in enacting the TCPA's ban on fax advertising, considered the "numerous and obvious less-burdensome alternatives," *Discovery Network*, 507 U.S. at 418. A "do not fax" list or a requirement that the fax recipient first

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ground that the former are generally more "unwanted" by the fax-receiving audience. *Cf. Carey v. Brown*, 447 U.S. 455, 465 (1980).

object before filing suit "could advance the Government's asserted interest[s] in a manner less intrusive to . . . First Amendment rights. " *Rubin*, 514 U.S. at 491.

Equally important, the Eighth Circuit has admitted that the TCPA will block consumers from receiving speech "they might have appreciated," Pet. App. 15a, the very result abjured by *Western States*. 535 U.S. at 377 ("The fact that the FDAMA would prohibit such seemingly useful speech even though doing so does not appear to further any asserted governmental objective confirms our belief that the prohibition is unconstitutional."). "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort. Yet here it seems to have been the first strategy the government thought to try." *Id.* at 373.

2. Numerous And Obvious Less Burdensome Alternatives Exist To Promote The Government's Interest.

The less intrusive alternatives are not only obvious, they are identified by the TCPA itself. Unlike its treatment of faxes, the TCPA's regulation of telemarketing does not require a phone call recipient's prior consent. Instead, the TCPA prohibits phone solicitations only where the recipient has previously objected. 47 U.S.C. § 227(c)(5) (authorizing private action for person who receives "more than one telephone call" from the same advertiser after requesting no further calls). This regulatory scheme has governed telemarketing since 1991.

A similar "first fax" exception is just as feasible and is currently employed by South Carolina. S.C. Code Ann. §§ 15-75-50 and 15-75-51. Neither the TCPA nor its legislative history explain why a first fax exception was not adopted in lieu of the Act's heavy-handed prohibition. Under a first fax exception, unlike the chosen prior consent scheme, customers who admittedly "might have appreciated" receiving a fax, Pet. App. 15a, would still be able to do so. These same customers, however, cannot opt out of the TCPA. *See U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1238-

39 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (striking a telecommunication regulation because the government failed to consider an "opt-out strategy" as a less restrictive alternative).

The TCPA also identifies a second less restrictive alternative – the creation of a do not call list. *See* 47 U.S.C. § 227(c)(3) (authorizing a do not call database for telephone solicitation). Already, there has been widespread approval and adoption of "do not call" lists – databases of telephone numbers of people who do not wish to receive telemarketing calls. At least 22 states currently have, or are now establishing, "no-call" lists.[4] On June 26, 2003, the FCC revised its rules implementing the TCPA and established, in coordination with the Federal Trade Commission, a national "do not call" registry. 47 C.F.R. § 64.1200; 16 C.F.R. §§ 310.4 and 310.8. The national list is accepting registrants, and is scheduled to become effective on October 1, 2003.

These "no call" lists have been extremely well received. The national "no call" registry, for example, already includes over 48 million phone numbers. *See Call Center Struggles In Face Of Do Not Call Rules*, New York Times, Sept. 22, 2003. The cost to maintain the list is recovered from telemarketers, who pay to acquire the list. *See* 16 C.F.R. § 310.8 ($25 per area code per year). Fax numbers could easily be added to the national "no call" list.

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[4] Ala. Code § 8-19C-3 (2002); Alaska Stat. Ann. § 45.50.475 (2001); Ark. Code Ann. § 4-99-404 (2001); Cal. Bus. & Prof. Code §17591 (2002), *updated by* 2002 Cal. Legis. Serv. CH. 698 (S.B. 1560)(West); Colo. Rev. Stat. § 6-1-901 *et seq.* (2002); Conn. Gen. Stat. Ann. § 42-288a (West 2002); Fla. Stat. Ann. § 501.059 (West 2002); Ga. Code Ann. § 46-5-27 (2002); Idaho Code §48-1003A (Michie 2002); Ind. Code Ann. § 24-4.7 (2002); 2002 Kan. Sess. Laws 179; Ky. Rev. Stat. Ann. § 367.46955(15) *amended by* 2002 Kentucky Laws Ch. 21 (H.B. 47); La. Rev. Stat. Ann. § 45:844.13 (West 2002); 2002 Minn. Chapter Laws 367; Mo. Rev. Stat. § 407.1098 (2001); N.Y. Gen. Bus. Law § 399-z (McKinney 2002); Or. Rev. Stat. § 646.574 (2001); Tenn. Code Ann. § 65-4-405 (2001); Tex. Bus. & Com. Code Ann. § 43.101 (2001); 2002 Vt. Laws 120; Wis. Stat. § 100.52 (2001); Wyo. Stat. Ann. § 40-12-302 (Michie 2002).

Like the "do not call" lists for telemarketing, a "do not fax" list is a less restrictive option that is readily available. *See* Pet. App. 39a (noting that a do not fax list "would promote the government's interest, and yet be less intrusive to First Amendment rights"). In a variation of this practice, several states require fax advertisers to maintain their own "no-fax" lists, and to place on unsolicited fax advertisements a telephone number or address where recipients can indicate their desire not to receive such faxes.[5] Congress was well aware of this alternative for fax advertising and considered its adoption in various forms in three house bills preceding the TCPA.[6]

A "no-fax" list, unlike the TCPA, would allow interested recipients to keep receiving unsolicited faxes, while accommodating those who object to them. *See Edenfield*, 507 U.S. at 767 ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented"); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). Thus, a "no fax" list trusts individuals over the government to decide whether any particular speech is unwanted and restricts less speech.[7]

Another less intrusive restriction already in practice would be to impose content neutral limits on the length, number or frequency of unsolicited faxes. *See Discovery Network*, 507 U.S. at 417 (city's failure to regulate the "size, shape, appearance or number" of newsracks indicated that it had not "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition"). In New York, North Dakota, and Wisconsin, for example,

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[5] Colo. Rev. Stat. § 6-1-702(b)(2002); Minn. Stat. § 325E.395 (2001); Or. Rev. Stat. § 646.872 (2001); R.I. Gen. Laws § 6-47-1 (2001); Tenn. Code Ann. § 47-18-2501(a)(2001).

[6] *See* H.R. 2184, 101st Cong., 1st Sess. (1989); H.R. 2921, 101st Cong., 2d Sess. (1990); H.R. 1304, 102d Cong., 1st Sess. (1991).

[7] Because the federal do not call list only applies to commercial calls, it may still run afoul of *Discovery Network*. *See Mainstream Marketing Services, Inc. v. F.T.C.*, No. 03 N 0184 (D. Colo. Sept. 25, 2003).

unsolicited faxes are subject to short page limits, and must be received during business hours between 9 a.m. and 6 p.m.[8]

Other less restrictive alternatives include exceptions for faxes to parties with existing business relationships and inadvertent faxes to wrong numbers – both of which are not prohibited for telemarketing, *see* 47 U.S.C. § 227(c)(5) and § 227(a)(3), but are needlessly prohibited for unsolicited fax advertising under the TCPA.

The decision of the Eighth Circuit did not dispute whether any of these alternatives would restrict less speech. Nor did it dispute whether any of these alternatives could also serve the government's interests to block unwanted cost-shifting. Instead, the Eighth Circuit fell back on the old saw that intermediate scrutiny does not require the "least restrictive means" to achieve the government's ends. Pet. App. 15a. But as this Court's more recent decisions make clear, the existence of alternatives is critical to the "reasonable fit" analysis. *See Rubin*, 514 U.S. at 491 (noting alternatives "could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (finding non-speech restrictive alternatives "more likely to achieve the State's goal"). By glossing over these alternatives, the Eighth Circuit's application of the "reasonable fit" test is impossible to reconcile with this Court's mandate from *Western States* "that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." 535 U.S. at 371.

C. The Eighth Circuit's Decision Is Inconsistent With This Court's Decisions Rejecting Prior-Consent-To-Speak Laws.

While the Eighth Circuit acknowledged that "the effect of the TCPA will be that some consumers will not receive

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[8] N.Y. Gen. Bus. Law § 396-aa(1) (2002); N.D. Cent. Code § 51-07-23 (2001); Wis. Stat. § 134.72 (2001).

unsolicited advertisements they might have appreciated," it found the First Amendment satisfied by the fact that "[a]dvertisers may obtain consent for their faxes . . ." Pet. App. 15a. This conclusion cannot be squared with the decisions of this Court rejecting prior-consent-to-speak laws.

While the government may in some instances allow individuals to limit the speech they receive, *see Rowan*, 397 U.S. at 738, the government may not require prospective recipients to make an affirmative request for that speech. *See Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 69 n.18 (1983); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). For example, in *Lamont*, the Court considered a provision that required addressees to complete a form if they wished to receive mail considered to be communist propaganda. The Court struck the Act, noting that "[t]he addressee carries an affirmative obligation which we do not think the government may impose on him." 381 U.S. at 307. Similarly, in *Bolger* the Court held unconstitutional a ban on mailing *unsolicited* advertisements for contraceptives, finding unpersuasive "the argument that individuals can still request that they be sent appellee's mailings." 463 U.S. at 69 n.18; *see also Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1035 (1980) (FCC noting that "a complete ban on unsolicited calls or a prohibition on such calls to subscribers who have not affirmatively indicated a desire to receive them would probably be unlawful").

These decisions demonstrate that, at bottom, what the First Amendment guarantees is freedom of speech – not freedom to seek permission to speak, nor freedom to request that the receipt of speech be allowed. For those who do not wish to receive the speech, this Court has made clear that the recipients may "avert[] their eyes" and that the "short, though regular, journey from mail box to trash can. . . is an acceptable burden, at least so far as the Constitution is concerned." *Bolger*, 463 U.S. at 72; *see also Cohen v. California*, 403 U.S. 15, 21 (1971).

The Eighth Circuit, however, entirely ignored this line of cases, made no attempt to address *Lamont* or *Bolger*, despite Fax.com's reliance on them, and instead took the paternalistic position that "[i]t was not unreasonable for Congress to choose a system that protects those who would otherwise be forced to bear unwanted burdens over those who wish to send and receive unsolicited fax advertising." Pet. App. 15a. Yet, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503.[9]

That same paternalism in endemic to the statute. By requiring the recipient's "prior express invitation or permission," 47 U.S.C. § 227(a)(4), the TCPA prohibits a wide range of fax communications between willing senders and recipients. Indeed, the TCPA is so protective of those who may not desire faxes, that they are not trusted to make that decision themselves – as the government presumptively refuses for them, and for everyone. Individuals who find unsolicited faxes a valuable tool for gathering information about businesses with whom they were previously unacquainted have no recourse under the Act. They obviously cannot contact these as-yet-unknown businesses to give "express invitation or permission" for potential faxes.

Moreover, the TCPA is not saved simply because "[a]dvertisers remain free to publicize their products through any legal means." Pet. App. 17a. Not only are those legal means quickly disappearing, *see infra* at 26-30, it is well-established that an otherwise impermissible content-based restriction is not saved simply by noting the availability of other media. *See Discovery Network*, 507 U.S. at 427; *Bolger*, 463 U.S. at 68 n.18; *City of Ladue v. Gilleo*, 512

[9]This paternalism is particularly inexplicable give that fax advertising, unlike telemarketing, involves purely written communication that has a much lower risk of fraud or undue influence than a person-to-person communication. *See Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 475 (1988). If anything, it is easier to ignore a fax than hang up on a high pressure telemarketer – yet, the Act imposes a blanket ban on only faxes.

U.S. 43, 55 (1994). Faxes, as instantaneous communications on a sheet of paper, also offer unique benefits. If a business wants to send a coupon to prospective customers there is simply no means as quick and inexpensive as a fax. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (rejecting commercial speech restriction where alternative methods of advertising are more expensive or less likely to reach potential customers); *cf. Lorillard*, 533 U.S. at 565 (finding onsite advertising ban unconstitutional where "alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that onsite advertising does").

The presumption against speech embodied by the TCPA's fax provisions is only strengthened by recent regulations proffered by the FCC. Under the new regulations, scheduled to take effect on January 1, 2005, "an established business relationship . . . will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements." *See* FCC Report and Order, FCC-03-153 (July 3, 2003) at 113, ¶ 189. Instead, "the prior express invitation or permission of the recipient . . . must be in writing and include the recipient's signature." *Id.* at 111, ¶187. This prior consent regime is an anathema to free speech – supplanting the choice of uninterested recipients to avert their eyes with a one-size-fits-all anti-speech fiat.

D. The Decision Below Contributes To Confusion In The Lower Courts.

The decision below is inconsistent with lower court decisions taking a stronger view of *Discovery Network* in analyzing underinclusive content-based speech restrictions. The stricter approach is well illustrated by *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998), which was on remand from this Court for further consideration in light of *Discovery Network*. Recognizing that *Discovery Network* had changed the playing field, the Seventh Circuit held that "the distinction between real estate solicitation and other types of

solicitation [in an Illinois anti-solicitation statute] is not plausible absent evidence that real estate solicitation poses a particular threat to residential privacy." The *Pearson* court admitted that it had not been too concerned with this underinclusiveness before, but that after *Discovery Network*, "now we must be." *Id.* at 404.

Other courts adopting a strong approach to *Discovery Network* have, in decisions inconsistent with the decision in this case, struck down a variety of laws that target commercial speech for reasons unrelated to its commercial content. *See, e.g., Lysaght v. New Jersey*, 837 F. Supp. 646, 651-52 (D.N.J. 1993) (state law prohibiting prerecorded commercial, but not noncommercial, telephone messages); *Anabell's Ice Cream Corp. v. Glocester*, 925 F. Supp. 920 (D.R.I. 1996) (ordinance prohibiting use of electronic noisemaking devices by merchants but not others); *Moser v. FCC*, 826 F. Supp. 360, 366 (D. Or. 1993), *rev'd on other grounds*, 46 F.3d 970 (9th Cir. 1995) (TCPA provision requiring FCC to restrict commercial, but not noncommercial, artificial or prerecorded voice calls).

Courts adopting a more liberal view of *Discovery Network* have focused on whether a narrow formulation of the government's interest justifies the limited scope of challenged restrictions. For example, the Eighth Circuit decision here recharacterized the government's interest as "reducing the costs and interference associated with *unwanted* faxes." Pet. App. 10a. The Ninth Circuit took a similar approach in *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54, 56 (9th Cir. 1995), characterizing the government's goal as "to prevent the shifting of *advertising* costs." Not all courts take such a narrow view of the government's interest. The Second Circuit has rejected this approach, noting that if the interest is viewed so narrowly, "any regulation that makes any contribution to achieving a state objective would pass muster." *See Bad Frog Brewery, Inc. v. NY State Liquor Auth.*, 134 F.3d 87, 100 (2d Cir. 1998).

Lower courts' confusion regarding underinclusive commercial speech restrictions is exacerbated by uncertainty regarding the role of other decisions of this Court. For example, courts have noted confusion regarding the interplay of *Discovery Network* and the plurality decision in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). *See, e.g., Lavey v. City of Two Rivers*, 171 F.3d 1110, 1115 n.16 (7th Cir. 1999) (noting uncertainty); *Outdoor Systems, Inc. v. Mesa*, 997 F.2d 604 (9th Cir. 1993) (following *Metromedia*, although court was "somewhat uneasy" regarding standard in light of *Discovery Network*); *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1065 n.35 (3rd Cir. 1994) (noting "significant tension" between two decisions). Similarly, several courts have exhibited uncertainty regarding the application in the commercial speech context of the underinclusiveness analysis of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *See, e.g., Valley Broad. Co. v. United States*, 107 F.3d 1328, 1331 (9th Cir. 1997); *MD II Entm't, Inc. v. Dallas*, 28 F.3d 492, 495 (5th Cir. 1994); *Holding v. Anchorage*, 63 P.3d 248 (Alaska 2003); *Rappa*, 18 F.3d at 1066 n.40.

Lower courts would also benefit from guidance in the proper treatment of less restrictive alternatives. Many cases upholding restrictions, like the decision below, rely heavily on the fact that the "least restrictive means" is not required. *See, e.g., Ass'n of Nat'l Advertisers v. Lungren*, 44 F.3d 726, 735 (9th Cir. 1994) (adopting "far-less-restrictive-means test). Other cases recognize that "in its most recent commercial speech decisions, the Supreme Court has placed renewed emphasis on the need for narrow tailoring," and thus invalidate restrictions that ignore less restrictive options. *Bad Frog Brewery*, 134 F.3d at 101; *see also, e.g., Revo v. Disciplinary Bd.*, 106 F.3d 929 (10th Cir. 1997). Confusion on this issue will only grow as lower courts navigate between the standing instruction that the "least restrictive alternative" is not required and the recent admonition that "if the Government could achieve its interests in a manner that . . . restricts less speech, the Government must do so." *Western States*, 535 U.S. at 371. The gap in these tests invites lower courts to pick and choose which standard to

apply – and the more permissive standard creates a strong disincentive for legislatures to investigate and implement non-speech restrictive alternatives.

Highlighting the difficult choices confronting lower courts, just days ago, one court rejected the national "do not call" registry on First Amendment grounds. *See Mainstream Marketing Services, Inc. v. F.T.C.*, No. 03 N 0184 (D. Colo. Sept. 25, 2003). In a decision adopting the strict approach to *Discovery Network* and its progeny like *Pearson*, and specifically relying on *R.A.V.*, *id.* at 23 n.3, and 26 n.4, the court held that because the registry only applies to commercial calls it "creates a burden on one type of speech based solely on its content" and does so "without a valid interest premised on content to justify its discrimination." *Id.* at 26-27. This holding is in direct conflict with the decision below, and illustrates the recurring nature of these questions and the need for guidance from this Court.

II. The Court Should Clarify The Applicability And Scope Of This Court's Decision In *Central Hudson*.

A. The *Central Hudson* Standard Is The Subject Of Recurring Criticism.

In *Central Hudson* this Court adopted an intermediate-scrutiny test for addressing First Amendment challenges to restrictions on commercial speech. In the years since *Central Hudson* was decided, however, considerable dissatisfaction has developed with the test announced by that decision. In *Greater New Orleans*, 527 U.S. at 184, for example, eight Justices noted that "certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech."

Similarly, in *44 Liquormart*, the Court unanimously invalidated the liquor advertising restrictions at issue, but was deeply divided over the proper scope of *Central Hudson*. Justices Stevens, Kennedy, and Ginsburg noted that

> when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

517 U.S. at 501 (plurality). Justice Thomas went further, explaining that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" *Id.* at 522-23 (concurring in the judgment). Justice Scalia "share[d] Justice Thomas's discomfort with the *Central Hudson* test," which he found "to have nothing more than policy intuition to support it." *Id.* at 517 (concurring in the judgment).

More recently, in *Lorillard*, the Court again recognized that "several Members of the Court have expressed doubts about the Central Hudson analysis and whether it should apply in particular cases." 533 U.S. at 553. Justice Kennedy, in a concurring opinion joined by Justice Scalia, noted his "continuing concerns that [*Central Hudson*] gives insufficient protection to truthful, nonmisleading commercial speech." *Id.* at 571-72 (concurring). Justice Thomas also noted his ongoing displeasure with *Central Hudson's* standard. *See id.* at 572 (concurring).

Other cases are to the same end. *See, e.g., Rubin*, 514 U.S. at 492 (Stevens, J., concurring in the judgment) (*Central Hudson* applies only where government seeks to "prohibit misleading speech that would be protected in other contexts" or to "requir[e] affirmative disclosures that the speaker might not make voluntarily"); *Discovery Network*, 507 U.S. at 433-34 and n.1 (1993) (Blackmun, J., concurring in the judgment) (intermediate scrutiny is appropriate only where commercial speech involves "false statements of fact" or "advocat[es] illegal activities").

Thus, over the last decade alone, six Justices – including a majority of the current Court – have indicated that *Central Hudson* does not or should not establish a test of

intermediate scrutiny that is generally applicable to all commercial speech restrictions.

B. Strict Scrutiny Should At Least Apply To Content-Based Restrictions Justified Only By Concerns Regarding The Means Of Distribution, A Question Left Open By *Discovery Network*.

Even to the extent that the *Central Hudson* standard remains appropriate in some contexts, it should have no application to a content-based regulation that is justified by the government's interest in restricting a particular *means* of communication. In *Discovery Network*, this Court recognized that "the principle reason for drawing a distinction between commercial and noncommercial speech has little, if any, application to a regulation of their distribution practices." *Discovery Network*, 507 U.S. at n.21. Indeed, the Court noted that strict scrutiny would "seem" to apply in such cases, although it ultimately did not need to resolve this issue:

> [I]f commercial speech is entitled to "lesser protection" only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech. *Id.* at n.11.

These observations in *Discovery Network* reflect the consistent teaching of this Court's commercial speech cases. From its inception, the distinction between the protection afforded commercial and noncommercial speech has been linked to characteristics arising from commercial content. *See, e.g., Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24. Subsequent cases have continued to recognize that the ability to regulate commercial speech springs from the ability to regulate commercial transactions, which are "an area traditionally subject to government regulation." *Central*

Hudson, 447 U.S. at 562. It is in light of these principles, then, that *Discovery Network* recognized that where a regulation is concerned with restricting a particular *method* of communication, the unique concerns which justify lessened protection for commercial speech in some contexts are absent.

This understanding is also required by the general First Amendment principles articulated in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). In that case, the Court held that even categories of speech that are "unprotected" by the First Amendment (there, fighting words) cannot "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." Fighting words, the Court explained, are excluded from First Amendment protection because they involve "a particularly intolerable . . . *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.* at 393. But the ordinance at issue there, proscribing fighting words communicating racial, gender, or religious intolerance, did not single out "an especially offensive mode of expression, . . . for example, . . . fighting words that communicate ideas in a threatening . . . manner." *Id.* Instead, it made a content-based distinction that had nothing to do with the reason fighting words are unprotected, and the Court, accordingly, applied strict scrutiny.

If these principles apply to entirely unprotected categories of speech, then they also must apply to commercial speech, which plainly is a protected category. Here, because the rationales for affording reduced protection to commercial speech are inapplicable, the TCPA's fax restriction must be evaluated under general principles applicable to content-based regulations. Thus the TCPA's fax restriction could be sustained only if its discrimination against commercial speech were necessary to address a compelling interest, *see Simon & Schuster v. NY State Crime Victims Bd.*, 502 U.S. 105, 120 (1991), a standard the Act clearly cannot satisfy.

Accordingly, this case presents an excellent vehicle for clarifying the scope of *Central Hudson*, revisiting the issue

left open in *Discovery Network*, and applying the teachings of *R.A.V.* in this context.

III. The Constitutionality of the TCPA Is Of Great Public Importance And Deserves Review.

A. The TCPA's Fax Restrictions Have Generated A Wave Of Litigation.

To no one's surprise, commercial speakers are relying upon technological advances to advertise. This includes faxing, which many commercial speakers see as a vital means for communicating with customers, potential customers and businesses. Contrary to a common misperception, *see, e.g.,* Pet. App. 8a ("the junk fax advertiser . . . seizes your fax machine"), most commercial speakers utilize fax technology for commendable purposes. "There is a legitimate market for mass faxing. It helps pharmaceutical companies send drug information to doctors. Hotels and cruise lines use it to reach travel agents." Jeremiah Marquez, AP, *Unsolicited Faxed Ads Draw More Lawsuits*, Memphis Commercial Appeal, Sept. 7, 2003, at G1. Indeed, as the evidence before the trial court confirms, fax advertising is welcomed by many of its recipients. Office workers anticipate receiving menus and discount coupons from nearby restaurants. Restaurants depend on faxes from food wholesalers. And travelers enjoy the opportunity for inexpensive, last-minute vacations offered by hotel and tour operators.

Despite these benefits to businesses and consumers alike, the TCPA's undeniably broad reach has inspired a wave of lawsuits against commercial speakers. *See, e.g.,* William Glaberson, *Dispute Over Faxed Ads Draws Wide Scrutiny After $12 Million Award*, N.Y. Times, July 22, 2001, at 18. These suits are "filed against retailers that send fax advertisements directly to consumers" as well as "against marketing companies that retailers hire to send fax advertising." Glaberson, *Dispute Over Faxed Ads,* at 18. And they burden all types of commercial advertisers, from our nation's largest private employer, *see, e.g., Lipscomb v.*

Wal-Mart Stores, Inc., No. 01-CP-20-63 (Fairfield County, C.P. Ct., S.C.) (filed Oct. 8, 2001), to some of its smallest, *see Rudgayzer & Gratt v. Enine, Inc.*, No. 32527/01, at 7 (N.Y.C. Civil Court Sept. 30, 2002) ("the advertiser who hires Fax.com to send out ads by fax may be smaller than the business recipient complaining about the fax"), to some of its most well-known, *see* Ellena Morrison, *Lawsuits curb fax advertising*, Fort Worth Star Telegram, Dec. 5, 2001, at 7 ("the Dallas Cowboys agreed to pay $1.73 million in a class action" under the TCPA as "one of several recent high-dollar settlements").

One cannot overstate the consequences of these legal actions. Class actions lawsuits, whether brought by an individual or by an attorney general on behalf of the State's residents, dramatically change the stakes in TCPA litigation. For example, a plaintiff class suing under the TCPA in Georgia was awarded nearly $12 million in damages, including $4 million in attorney fees. *See Nicholson v. Hooters of Augusta, Inc.*, No. 95-RCCV-616 (Ga. Sup. Ct. Apr. 25, 2001). The $12 million in damages were awarded to 1,321 class members who each received six unsolicited fax advertisements. The company that made the mistake of sponsoring those six commercial faxes was forced into bankruptcy. *See In re Hooters of Augusta*, No. 1-01-6K-67611 (Bankr. N.D. Ga. filed June 8, 2001).

That company is not alone. "Faced with a large suit by the Texas attorney general filed under" the TCPA, one "in excess of $1 billion," American Blast Fax, a company that specialized in fax communication, has "close[d] its doors." Glaberson, *Dispute Over Faxed Ads,* at 18. Other commercial speakers, recognizing the devastating consequences a judgment could bring, have settled these suits, but not without significant payouts. *See, e.g., id.* (noting "a settlement of another class-action suit in which a North Charleston Ramada Inn paid $450,000" for sending faxes "advertising a New Year's Eve celebration"); Erin Suess, *Suits Over Unsolicited Faxes On The Rise*, St. Louis Daily Record, Aug. 10, 2002 ($6.5 million "settlement

between Illinois car dealership . . . and the recipients of faxes advertising the dealership"). If recent history is any guide, these lawsuits will continue for the foreseeable future. *See* Seuss, *Suits Over Unsolicited Faxes On The Rise.*

B. Today's Issue Will Evade Future Review.

While these cases have yet to generate a deep split of authority over the specific issue of the constitutionality of the TCPA's fax restrictions, *cf.* Sup. Ct. R. 10 (a), the Court would be ill-advised to wait for that issue to percolate in the lower courts. At the outset, a deep split in the federal circuits is exceedingly unlikely. Except for actions like this one brought by State attorney generals, the TCPA requires that cases be brought in state court, *see* 47 U.S.C. § 227(b)(3), meaning that few federal circuits will be asked to pass on the issues raised here. And as to the state courts, one can fairly expect that many of those courts will defer in practice to federal courts on issues of federal law. *See*, *e.g.*, *Lawson v. Reeves*, 537 So. 2d 15, 16-17 (Ala. 1988). This leaves the Eighth Circuit's underlying decision as the leading federal appellate authority on today's important federal question.

And even if the lower state and federal courts might entertain breaking with the Eighth Circuit's decision here, the chances to do so will be exceedingly rare. While the number of suits filed under the TCPA continues to grow seemingly without end, few if any will run the full course through the state or appellate courts and to the door of this Court. For individual plaintiffs that challenge the sending of one unauthorized fax, the plaintiff, should he prevail, is entitled to a maximum award of $1,500. One can fairly wonder how many defendants would pursue layers of appeals, and incur the associated legal fees, to challenge an award of this size on constitutional grounds.

The rest of the cases pursued under the TCPA are class actions. There too the likelihood of appeal is diminished by the amount of money at issue. In what may be the most notable example, a lawsuit was recently filed in California

against petitioner and its 10,000 advertisers demanding an astonishing $2.2 trillion in damages. *See Kirsch v. Fax.com. Inc.*, No. CV810516 (Santa Clara Cty., Cal. Super.) (filed Aug. 22, 2002); *"Lawsuits seek $2.2 Trillion over Faxes,"* (www.cnn.com/2002/LAW/08/23/junk.faxes.ap/index.html) (Aug. 23, 2002). The defendants in many of these cases risk multi-million-dollar judgments if they do not settle before trial, *see, e.g., Nicholson*, *supra* at 27, and when a large judgment is entered after a trial, few defendants will be able to post the bond necessary for an appeal. Thus, today's case presents one of the rare opportunities for the Court to address the important constitutional issues raised by the TCPA. Otherwise, those issues could remain unanswered for years to come, at least as a matter of this Court's jurisprudence.

Which, it bears noting, would be bad news for America's legitimate and truthful commercial speakers. Faced with the threat of lawsuits of this ilk, many businesses will do what many have already done – simply pull the plug on fax advertising altogether – effectively silencing an entire category of commercial speech. Today's constitutional question should be addressed now rather than later.

C. Fax Advertisers And Their Customers Are Not The Only Parties That Would Benefit From The Court Addressing Today's Question.

The writ should be granted in this case for one other important reason: the case has importance far beyond fax advertising. Just as technology continues to offer innovative avenues to commercial speakers, legislatures are equally quick to keep commercial speakers from utilizing those technologies. In the 108th Congress, for example, no fewer than nine separate bills were introduced limiting commercial speech by e-mail, with at least one calling for a nationwide ban on the use of telecommunications devices to solicit business.[10] The same is true at the state level, where new

[10] *See* Anti-Spam Act of 2003 (H.R. 2515); Ban on Deceptive Unsolicited Bulk Electronic Mail Act of 2003 (S. 1052); CAN-SPAM Act of 2003 (S. 877); Computer Owner's Bill of Rights (S. 563);

legislative restrictions on commercial speech have already taken hold. *See, e.g.*, Cal. Bus. & Prof. Code §17529.2(a), (b) (banning all unsolicited commercial email); Va. Code §18.2-152.3:1 (felony anti-spam statute). Just days ago, California enacted "the most wide reaching law of any of the 35 other state laws meant to regulate spam." *See California Is Set to Ban Spam*, New York Times (Sept. 24, 2003). As the act's sponsor explained, "[w]e are saying that unsolicited email cannot be sent and there are no loopholes." *Id.* The act's "proponents" note that "[a] similar provision is credited with helping to ensure compliance with the federal law against unsolicited faxes." *Id.* It is thus unsurprising that many commentators see these legislative acts as well as the TCPA as "part of a growing effort to curtail many types of advertising, including telemarketing and mass e-mail advertising." Glaberson, *Dispute Over Faxed Ads*, at 18.

While the questions over excluding advertisers from entire channels of communication will only grow in importance, today's and tomorrow's far-ranging legislative restrictions on commercial speech lamentably are enacted without the benefit of clear guidance. Today's case squarely presents the chance to establish the standard of protection benefiting commercial speech generally, and technology-driven speech specifically. A decision in this case will provide legislatures with a roadmap for answering these recurring questions surrounding emerging communication technologies.

CONCLUSION

The petition should be granted.

Criminal Spam Act of 2003 (S. 1293); REDUCE SPAM Act of 2003 (H.R. 1993); Reduction in Distribution of Spam Act of 2003 (H.R. 2214); Stop Pornography and Abusive Marketing Act (S. 1231); Wireless Telephone Spam Protection Act (H.R. 122).

October 2003

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2705/02-2707

State of Missouri, ex rel.,	*	
	*	
Appellant,	*	Order Denying Petition
	*	for Rehearing and for
v.	*	Rehearing En Banc
	*	
American Blast Fax, Inc.,	*	
et al.,	*	
	*	
Appellees.		

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Theodore McMillian and Judge Morris S. Arnold did not participate in the consideration or decision of this matter. (5128-010199)

July 3, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
Eighth Circuit.

Nos. 02-2705, 02-2707

State of Missouri, ex rel. Jeremiah W. (Jay) Nixon, Attorney General, Plaintiff-Appellant, United States of America, Intervenor/Plaintiff-Appellant, v. American Blast Fax, Inc., a Texas corporation not authorized to transact business in Missouri as a foreign corporation, Defendant-Appellee, Fax.com, Inc. Movant-Appellee.	*	Appeal from the United States District Court for the Eastern District of Missouri
State of California; State of Alaska; State of Arkansas; State of Connecticut; State of Colorado; District of Columbia; State of Florida; State of Idaho; State of Illinois; State of Iowa; State of Kentucky; State of Maryland; State of Michigan; State of Minnesota; State of New Mexico; State of Oregon, State of South Dakota; State of Texas; State of Vermont; State of West	*	

Virginia, *

*

Amici Curiae on behalf of Appellants, *

American Business Media; Wal-Mart Stores, Inc.; ACS Systems, Incorporated; Micro General Corporation, *

*

Amici Curiae on behalf of Appellees. *

Submitted: Jan. 13, 2003
Filed: March 21, 2003

Before WOLLMAN and MURPHY, Circuit Judges, and GRITZNER,[1] District Judge.

MURPHY, Circuit Judge.

In these two consolidated cases the State of Missouri sued American Blast Fax, Inc. and Fax.com, Inc. for violating statutory restrictions on unsolicited fax advertising. The district court held that the relevant part of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227(b)(1)(C) (2000), violated the First Amendment guarantee of freedom of speech, and dismissed the action.[2] *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 196 F. Supp. 2d 920, 934 (E.D. Mo. 2002). Intervenor United States and

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[1] The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

[2] The district court also dismissed other allegations in the complaints. Also dismissed were alleged statutory violations for omitting information required by TCPA sec. 3, § 227(d), 47 U.S.C. § 227(d), and for misrepresenting that advertisements complied with federal law in violation of the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010. No issue has been raised on appeal about these dismissed claims. *See Halabi v. Ashcroft*, 316 F.3d 807, 808 (8th Cir. 2003) (objection waived if not briefed).

Missouri appeal (collectively "the Government"). We reverse.

I.

American Blast Fax[3] and Fax.com (FC) provide promotional services by transmitting client advertisements to the fax machines of potential customers. In response to numerous consumer complaints, Missouri sought injunctions and civil penalties against the two companies, alleging that they had violated the provision of TCPA making it unlawful "to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). An "unsolicited advertisement" is defined in the statute as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* § 227(a)(4).

The fax companies moved to dismiss the complaints, arguing that § 227(b)(1)(C) was an unconstitutional restriction on their freedom of speech. The district court decided that the legislative record was insufficient to decide the constitutional questions and ordered an evidentiary hearing, converting the motions to ones for summary judgment. It also granted the motion of the United States to intervene.

At the hearing, the Government presented evidence that unsolicited fax advertising shifts costs to the recipients who are forced to contribute ink, paper, wear on their fax machines, as well as personnel time. There was also evidence to show that a fax advertisement interferes with the recipients' use of their machines by preempting the fax line for the time it takes to send a message. Witnesses testified on behalf of the attorneys general of Florida and Washington that their offices had been receiving increasing numbers of

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[3] American Blast Fax has not participated in this appeal and may no longer be in business. *See Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 196 F. Supp. 2d 920, 922 n.3, 923 n.4 (E.D. Mo. 2002).

complaints about unsolicited fax advertisements. The defendant companies presented evidence that technological advances had reduced the amount of costs and interference experienced by recipients and that fax advertising benefits both advertisers and consumers.

The district court approached the constitutional questions by applying the four part test for restrictions on commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). The court questioned whether the government had shown that there was a substantial governmental interest in restricting unsolicited fax advertising. It noted the absence of empirical data on costs or evidence that the majority of unsolicited fax advertisements involved commercial speech. It also observed that complaints about unsolicited faxes had increased despite the legislation and that several less restrictive options were available, such as a national no fax database, and it concluded that the Government had not demonstrated that the § 227(b)(1)(C) restriction would materially alleviate the asserted harm or that it was sufficiently narrow. After concluding that § 227(b)(1)(C) violated the First Amendment, the district court granted the pending motions and dismissed the action.

The United States and Missouri appeal. They argue that the statute is constitutional and that the district court erred in its application of the *Central Hudson* test. They contend that there was sufficient evidence to demonstrate a substantial government interest in restricting unsolicited fax advertisements and that TCPA materially advanced that interest and was not more extensive than necessary. They argue that technological changes have not eliminated the burdens imposed on recipients of unwanted fax advertising and that the district court was wrong to substitute its own judgment for the conclusion of Congress that the restriction was the minimum necessary to protect the public. They also point out that no other federal court has found this statute unconstitutional. *See Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 57 (9th Cir. 1995), *aff'g* 844 F. Supp. 632 (D. Or.

1994); *Texas v. Am. Blast Fax, Inc.*, 121 F. Supp. 2d 1085, 1092 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997).

II.

The parties agree that the fax advertisements in question are commercial speech, and the Supreme Court has recently indicated that *Central Hudson* remains the test for the constitutionality of a restriction on commercial speech. *See Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002). Under *Central Hudson*

> we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, we next ask "whether the asserted governmental interest is substantial." If it is, then we "determine whether the regulation directly advances the governmental interest asserted," and, finally, "whether it is not more extensive than is necessary to serve that interest." Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.

Id. (citations omitted) (quoting *Central Hudson*, 447 U.S. at 566). Since it is not argued here that the faxes were misleading or concerned unlawful activity, only the final three elements of the *Central Hudson* test are at issue. We review an order granting summary judgment de novo. *Donovan v. Harrah's Md. Heights Corp.*, 289 F.3d 527, 528 (8th Cir. 2002).

A.

FC argues that the Government has not shown a substantial governmental interest. It contends that the asserted interest, preventing unwanted fax advertising from shifting advertising costs to unwilling consumers and interfering with their fax machines, is insufficient to justify the statutory restriction. It contends that the Government has

not produced empirical data to support its assertion and that technological progress has reduced any harm to a de minimis level. *See Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (government "must demonstrate that the harms it recites are real").

We do not agree with FC that the Government must produce empirical studies to show the significance of the harm it seeks to remedy, for the Supreme Court has pointed out that it may demonstrate the substantiality of its interest with anecdotes, "history, consensus, and 'simple common sense.'" *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)); *cf. Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995) ("external evidence" of harm unnecessary in case involving content neutral speech restriction). In this case, the legislative record and the evidence produced in the district court adequately demonstrate the potential harm of unrestrained fax advertising.

We first turn to the legislative history, which predates the passage of TCPA. A hearing on predecessor bills showed that Congress had become aware of a "junk fax" problem from media reports and legislative initiatives in many states. *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131, and H.R. 2184 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong. 2-3 (1989) (statements of Chair Markey and Rep. Rinaldo, Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce). A Maryland official testified that even though his state had passed a measure to ban unsolicited commercial fax advertisements, federal legislation was required for a full solution to a problem likely "to grow in scale." *Id.* at 82-83 (statement of John M. Glynn, Maryland Office of People's Counsel). The subcommittee was also presented with research which indicated the pervasive nature of this type of advertising. It was reported that at least one fax advertiser could "routinely send[ ] 60,000 fax advertisements per week" and that "business owners are virtually unanimous in their view that

they do not want their fax lines tied up by advertisers trying to send messages." *Id.* at 54-56 (footnote omitted) (statement of Robert L. Ellis, Indiana University School of Law).

In hearings held in 1991, the co-founder of the Center for the Study of Commercialism described the "numerous nuisance faxes" he had received and complained that they "not only use the recipient's paper, but also prevent faxes from being sent out and prevent legitimate faxes from coming in." *Hearing on S. 1462, S. 1410, and S. 857 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Sci., and Transp.*, 102d Cong. 41 (1991) (statement of Michael Jacobson). A House subcommittee heard from the chair of the Florida Public Service Commission that "[t]he junk fax advertiser is a nuisance who wants to print [its] add [sic] on your paper ... [and] seizes your fax machine so that it is not available for calls you want or need." *Telemarketing/Privacy Issues: Hearing on H.R. 1304 and H.R. 1305 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 102d Cong. 31 (1991) (statement of Thomas Beard). TCPA was subsequently enacted in that same year.

The hearing held in the district court in 2001 also produced evidence that the harms of unsolicited fax advertising are real and have not been eliminated by technological changes. There was evidence that unsolicited fax advertisements can shift to the recipient more than one hundred dollars per year in direct costs, that it takes thirty seconds for a one page fax to be received, that most machines can still only receive one fax at a time, that currently eighty percent of all faxes are printed on paper, and that unsolicited fax advertising interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems. The record evidence from that hearing indicates that the costs and amount of interference resulting from unrestrained fax advertising continue to be significant. *See Destination Ventures*, 46 F.3d at 57

("[U]nsolicited fax advertisements shift significant advertising costs to consumers.").

We conclude that the Government has demonstrated a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient.

B.

FC contends that there are several reasons why the TCPA restriction on commercial faxes cannot survive the third part of the *Central Hudson* test, which requires a showing that "'the regulation directly advances the governmental interest asserted.'" *W. States*, 122 S. Ct. at 1504 (quoting *Central Hudson*, 447 U.S. at 566); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) ("Government carries the burden of showing that the challenged regulation advances the Government's interest in a direct and material way." (internal quotation marks omitted)). This step helps ensure that there is "a reasonable fit between the legislature's ends and the means chosen to accomplish [them]." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (internal quotations marks omitted).

1.

FC argues that if a restriction treats commercial and noncommercial speech differently, there must be a basis for the difference that is relevant to the asserted governmental interest. FC contends that this case is just like *City of Cincinnati v. Discovery Network, Inc.* where an ordinance was found unconstitutional because there was not a good fit between the asserted aesthetic interest and the ban on only commercial newsracks on the street. *See* 507 U.S. 410, 425, 428 (1993). FC argues that a noncommercial fax shifts costs and interferes with a recipient's fax machine just as much as a commercial fax.

This case is different from *Discovery Network*, however, because the distinction between commercial and

noncommercial faxes is relevant to the asserted governmental interest. In *Discovery Network* the only justification advanced by the city for singling out commercial newsracks was "the 'low value' of commercial speech," a position which the court refused to adopt. 507 U.S. at 428. When Congress enacted TCPA, however, it had found that "non-commercial calls ... are less intrusive to consumers because they are more expected." H.R. Rep. No. 102-317, at 16 (1991). There is no reason to doubt that Congress also believed for the same reason that noncommercial faxes did not present the same problem as commercial faxes and therefore distinguished between them. The Supreme Court has indicated that Congress may rely on various forms of evidence to distinguish between different types of speech. *See Florida Bar*, 515 U.S. at 628. For example, restrictions on speech may be justified "by reference to studies and anecdotes pertaining to different locales altogether ... [and] history, consensus, and 'simple common sense.'" *Id.* (quoting *Freeman*, 504 U.S. at 211). The legislative history here shows that TCPA's distinction between commercial and noncommercial fax advertising is relevant to the goal of reducing the costs and interference associated with *unwanted* faxes. We agree with the Ninth Circuit that this distinction is justified.[4] *Destination Ventures*, 46 F.3d at 56.

2.

FC also argues that the restriction on fax advertising cannot directly and materially advance the asserted governmental interest because gaps in the statute's coverage limit its effectiveness. Unsolicited live telemarketing calls,

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[4] *Discovery Network* also differs from this case in that commercial newsracks represented only a small percentage of the newsracks on Cincinnati streets, 507 U.S. at 418, while commercial faxes make up a large proportion of all unsolicited faxes, *see infra* p. 658. Moreover, the government may regulate one aspect of a problem without regulating all others, *see United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993) ("Government [is not required to] make progress on every front before it can make progress on any front.").

some types of unsolicited commercial faxes, and unsolicited noncommercial faxes are not restricted, and FC contends that TCPA thus resembles the statutes struck down in *Coors*, 514 U.S. at 488, and *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 190 (1999).

TCPA is quite different from the statutes at issue in *Coors* and *Greater New Orleans*. In *Coors*, the government claimed that legislation prohibiting the display of alcohol content on beer labels advanced the legislative interest in "curbing 'strength wars' by beer brewers who might seek to compete for customers on the basis of alcohol content." 514 U.S. at 483. The Supreme Court found "overall irrationality" in the statute since it did not apply to advertisements, and alcohol content in a product could be widely disclosed by other means; such advertising would appear to be "a more influential weapon in any strength war than labels." *Id.* at 488. Moreover, the statutory restriction did not apply to wine, spirits, or the "term 'malt liquor.'" *Id.* at 488-89. The asserted governmental interest in suppressing competition based on high alcohol content was therefore unlikely to be advanced. Likewise, in *Greater New Orleans* the Court was skeptical about the government's position that legislation banning advertisements for private casino gambling served the governmental interests of "reducing the social costs associated with 'gambling'" and helping states restrict it. 527 U.S. at 185. The Court found the government's position inconsistent with its "simultaneous" support for tribal casino gambling which could involve the same social costs. *Id.* at 189-91. Inconsistencies and discrepancies in these two pieces of legislation therefore showed that the statutes were not likely to advance their asserted purposes. *See id.* at 190; *Coors*, 514 U.S. at 489.

TCPA by contrast contains no inconsistency that renders it incapable of materially advancing the Government's asserted interest. While there is differential treatment in TCPA of unsolicited fax advertisements and live telemarketing calls, the difference is consistent with TCPA's goal to protect members of the public from bearing the costs of unwanted

advertising.[5] Thus, TCPA treats live telemarketing solicitations differently if they impose costs on the recipient. While they are generally permitted unless an individual has registered an objection to being contacted, *see* 47 U.S.C. § 227(c), 47 C.F.R. § 64.1200(e)(2)(iii) (2002), they are prohibited when they result in out of pocket costs for the recipient, *see* 47 U.S.C. § 227(b)(1)(A)(iii) (prohibiting calls made without consent "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call"). Because of the cost shifting of fax advertising, it was consistent for Congress to treat unsolicited fax advertisements differently than live telemarketing calls. The distinction in no way undercuts the TCPA goal of protecting the public from unwanted advertising costs.

FC also argues that the legislation was made unconstitutionally inconsistent by a statutory interpretation of the Federal Communications Commission (FCC). The FCC has interpreted TCPA not to prohibit the sending of unsolicited commercial faxes to a recipient with whom a sender has an established business relationship. *See* In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8779 n.87 (Oct. 16, 1992). Even if one assumes that

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[5] The distinction made in TCPA between live telemarketing calls and faxes is also consistent with other concerns behind the statutory scheme. Because Congress found telemarketing solicitations made by a person to be less of a nuisance or of an invasion of privacy than artificial or prerecorded calls, *see* S. Rep. No. 102-178, at 4 & n.4, 5 & n.5 (1991), *reprinted in* 1991 U.S.C.C.A.N.1968, 1972-73, live solicitations are permitted unless an individual has registered an objection in advance, *see* 47 U.S.C. § 227(c), 47 C.F.R. § 64.1200(e)(2)(iii) (2002), while "artificial" calls are prohibited without the recipient's express consent, 47 U.S.C. § 227(b)(1)(B). Artificial or prerecorded messages, like a faxed advertisement, were believed to have heightened intrusiveness because they are unable to "interact with the customer except in preprogrammed ways." S. Rep. No. 102-178, at 4-5, *reprinted in* 1991 U.S.C.C.A.N. at 1972.

this FCC interpretation is entitled to deference and is part of the governing law, it does not undermine the governmental interest in reducing the cost shifting and interference caused by unwanted commercial faxes. It would not have been unreasonable for Congress to conclude that a preexisting business relationship is an indication that a fax advertisement would be welcome. Congress in fact made this distinction explicit with respect to telephone solicitations. *See* 47 U.S.C. § 227(a)(3). We cannot conclude that this exemption renders the statute so "pierced by exemptions and inconsistencies," *Greater New Orleans*, 527 U.S. at 190, or "overall irrational[ ]," *Coors*, 514 U.S. at 488, that it cannot materially and directly advance the governmental interest.[6]

Finally, FC urges that TCPA's prohibition of only unsolicited commercial faxes prevents the statute from advancing the asserted governmental interest. The legislative record indicates that commercial calls constitute the bulk of all telemarketing calls, see H.R. Rep. No. 102-317, at 16, and in the absence of contrary evidence we are persuaded that commercial faxes likely constitute a similar proportion of all unsolicited faxes, *cf. Florida Bar*, 515 U.S. at 628 (restrictions on speech may be justified "by reference to studies and anecdotes pertaining to different locales altogether ... [and] history, consensus, and 'simple common sense'" (quoting *Freeman*, 504 U.S. at 211)). By placing

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[6] FC argues in addition that TCPA does not prohibit unsolicited commercial faxes regarding job openings and "image" advertisements not explicitly offering a product for sale. These are not exceptions contained in the statute, however. One was put forward by a federal district judge, *see Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 181-82 (E.D. Pa.1994) (faxed advertising of job openings do not fall within the scope of TCPA), and the other has been asserted by FC itself. Not only are these "exceptions" not in the statute, but they would not undermine the Government's asserted purpose, unlike the statutory exceptions in *Coors*, 514 U.S. at 489, and *Greater New Orleans*, 527 U.S. at 190. In contrast, TCPA directly and materially advances Congress's goal by squarely addressing the category of commercial fax advertising that appears to make up a substantial portion of all such faxes, i.e., those "advertising the commercial availability or quality of any property, goods, or services," 47 U.S.C. § 227(a)(4).

restrictions on those responsible for a large portion of the problem, TCPA directly and materially advances the congressional goal of limiting the harm arising from unsolicited fax advertisements. Congress is not required to "make progress on every front before it can make progress on any front." *United States v. Edge Broad. Co.*, 509 U.S. 418, 432-34 (1993) (statute that effectively eliminated only small ratio of lottery advertisements still directly advanced a governmental interest of "discouraging public participation in lotteries"); *see also Destination Ventures*, 46 F.3d at 56 ("The First Amendment does not require Congress to forgo addressing the problem at all unless it completely eliminates cost shifting.").

We conclude that the TCPA's prohibition on unsolicited commercial fax advertisements directly and materially advances the asserted governmental interest and satisfies the third element of the *Central Hudson* test.

C.

The final question in the *Central Hudson* test is whether the restriction on speech is "'not more extensive than necessary to serve the interests that support it.'" *Lorillard*, 533 U.S. at 556 (quoting *Greater New Orleans*, 527 U.S. at 188). FC argues that there are several alternative solutions to the unsolicited fax problem which would be less restrictive and that this shows § 227(b)(1)(C) is too broadly drawn. FC contends in particular that Congress could have adopted an opt out mechanism that would require fax recipients to declare their desire not to receive unsolicited commercial faxes, rather than requiring fax advertisers to secure the consent of potential recipients.[7]

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[7] FC suggests, for example, that Congress could have implemented a scheme under which an advertiser is prohibited from sending a second fax to a person who has previously indicated that he does not wish to receive such faxes, similar to the manner in which live telemarketing is regulated under TCPA, *see* 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(e)(2). Another suggested alternative is a nationwide no fax list. FC also points out that several states have regulated unsolicited fax

We disagree that TCPA is unconstitutionally broad. The Supreme Court has made it clear that "the 'least restrictive means' test has no role in the commercial speech context." *Florida Bar*, 515 U.S. at 632. Instead, what is required

> "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends," a ["]fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective."

Id. (second alteration in original) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Section 227(b)(1)(C) satisfies this standard. Advertisers remain free to publicize their products through any legal means; they simply cannot do so through an unsolicited fax. TCPA does not act as a total ban on fax advertising. Advertisers may obtain consent for their faxes through such means as telephone solicitation, direct mailing, and interaction with customers in their shops. *Cf. Van Bergen*, 59 F.3d at 1556 ("Live telephone calls ... and bulk mailings are all inexpensive and effective [means of communication]."). While it is true that the effect of TCPA will be that some consumers will not receive unsolicited advertisements they might have appreciated, under the approach advocated by FC there would always be individuals suffering costs and interference from unwanted advertisements. It was not unreasonable for Congress to choose a system that protects those who would otherwise be forced to bear unwanted burdens over those who wish to send and receive unsolicited fax advertising. Given the cost shifting and interference imposed by unsolicited commercial faxes and the many alternatives left available to advertisers, TCPA's approach is "'in proportion to the interest served ... [and is] narrowly

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advertising by imposing strict page and time-of-day limits. *See, e.g.*, N.Y. Gen. Bus. Law § 396-aa(1); N.D. Cent. Code § 51-07-23; Wis. Stat § 134.72.

tailored to achieve the desired objective.'" *Florida Bar*, 515 U.S. at 632 (internal quotation marks omitted) (quoting *Fox*, 492 U.S. at 480).

The cases in which the Supreme Court has recently struck down restrictions on commercial speech for being too broadly drawn, *see W. States*, 122 S. Ct. at 1506; *Lorillard*, 533 U.S. at 561; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (opinion of Stevens, J., joined by Kennedy, Souter, and Ginsburg, JJ.); *Coors*, 514 U.S. at 490-91, had different characteristics than we are faced with here. First, those cases dealt with concerns not at issue here. The legislation there banned dissemination of truthful commercial information, either to "prevent members of the public from making bad decisions with the information," *W. States*, 122 S. Ct. at 1507, or to advance a governmental interest that could be furthered "without regulating speech," *44 Liquormart*, 517 U.S. at 503 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.). *See W. States*, 122 S. Ct. at 1500-01, 1505 (striking down federal restriction on advertisement and promotion of particular drugs where goal was to prevent large scale manufacturing); *Lorillard*, 533 U.S. at 533, 566-67, 569 (finding unconstitutional Massachusetts regulation of advertising to reduce underage tobacco use, but upholding restriction on manner of sale); *44 Liquormart*, 517 U.S. at 489-90 (striking effort to promote temperance by prohibiting advertisements of retail prices for alcoholic beverages); *Coors*, 514 U.S. at 483-84. In this case, the TCPA ban on unsolicited commercial fax advertisements is neither intended to protect the public from the content of the speech nor to implement policy unrelated to the delivery of the message itself. In prohibiting these fax advertisements, Congress was not concerned with the effect of the content of the advertisements, but rather with the effect of the act of communicating. This case is therefore more similar to *Florida Bar* where the Court upheld a ban on "targeted direct-mail solicitations [of] victims and their relatives [by attorneys] for 30 days following an accident or disaster." 515 U.S. at 620. The *Florida Bar* Court emphasized the fact that "the harm posited ... is as much a

function of simple receipt of targeted solicitations ... as it is a function of the letters' contents." *Id.* at 631. The harm associated with unsolicited fax advertisements is similarly not related to the content of the messages.

Second, the regulations at issue in three of the cases cited by FC were so broad as to "constitute nearly a complete ban on the communication of truthful information [about a commercial product]." *Lorillard*, 533 U.S. at 562; *see W. States*, 122 S. Ct. at 1502 (flat ban on all advertising of compounded drugs absent FDA approval of drug); *44 Liquormart*, 517 U.S. at 530-31 (opinion of O'Connor, J., joined by Rehnquist, C.J., Souter, J., and Breyer, J.) ("No channels exist at all to permit [liquor merchants] to publicize the price of their products."). Section 227(b)(1)(C) does no such thing, and advertisers remain free to publicize their products through many legal means other than an unsolicited fax. Moreover, TCPA has not eliminated the fax machine as an available channel of communication. If an advertiser wishes to promote its business by fax, there are many ways for it to secure the consent of willing potential customers, just as in *Florida Bar* where there were "many other ways for injured Floridians to learn about the availability of legal representation." 515 U.S. at 633; *see 44 Liquormart*, 517 U.S. at 502 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.) ("[W]e upheld [the *Florida Bar* regulation] largely because it left so many channels of communication open to Florida lawyers.").

We conclude that the TCPA restriction on unsolicited commercial fax advertisements achieves a reasonable fit between the means it adopts and the ends it seeks to serve. It thus satisfies the fourth element of the *Central Hudson* test. *See Florida Bar*, 515 U.S. at 632.

III.

We conclude that 47 U.S.C. § 227(b)(1)(C) satisfies the constitutional test for regulation of commercial speech and thus withstands First Amendment scrutiny. There is a substantial governmental interest in protecting the public

from the cost shifting and interference caused by unwanted fax advertisements, and the means chosen by Congress to address these harms directly and materially advances the governmental interest. The statute is also narrowly tailored to create a reasonable fit with its objective. Accordingly, we reverse the judgment dismissing the claims asserted under § 227(b)(1)(C) and remand the case to the district court for further proceedings consistent with this opinion.

United States District Court,
E.D. Missouri,
Eastern Division.

State of Missouri, ex rel. Jeremiah W. (Jay) Nixon,
Attorney General,
Plaintiff,
v.
American Blast Fax, Inc., et al., Defendants.

No. 4:00CV933 SNL

March 13, 2002

MEMORANDUM OPINION

LIMBAUGH, Senior District Judge.

This matter is before the Court on defendant American Blast Fax, Inc.'s motion to dismiss (# 9) and defendant Fax.com Inc.'s motion to dismiss.[1] The underlying lawsuit alleges that defendants violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, by sending unsolicited facsimile advertisements.[2] Plaintiff also alleges that defendants violated the Missouri Merchandising Practices Act (MPA), Mo. Rev. Stat. § 407.010, by misrepresenting to Missouri consumers that the fax messages were sent in accordance with federal law. Defendants contend that § 227 of the TCPA violates the First

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[1] This motion was document # 16 in Case No. 4:00cv1265LOD. The cases were consolidated, but the parties were not required to re-file motions already pending in those cases. Therefore, the motion does not have a document number in the current cause of action, Case No. 4:00 cv933SNL.

[2] Throughout this opinion, the Court continuously refers to the TCPA. When it makes such a reference, it is only referring to the faxing prohibition in § 227, and not the entire statute.

Amendment right of freedom of speech. They also contend that the MPA claim is based primarily on the assumption that defendants' conduct violates the TCPA, and therefore, that claim must also fail. The United States, *eo nomine*, and on behalf of the Federal Communications Commission (FCC), has intervened in this cause of action, in order to defend the constitutionality of the TCPA.

Standard

Defendants filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). If, on a 12(b)(6) motion, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. The Court ordered a hearing in this cause of action and listened to testimony for two days. Because these were matters presented outside the pleadings, the motions to dismiss have been converted to those for summary judgment. Therefore, the standard for summary judgment is proper for these motions.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins. Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977). However, summary judgment motions "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Federal Rule of Civil Procedure 56(c), a district court may grant a motion for summary judgment if all the information before the court demonstrates that "there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962). The burden is on the moving party. *Mt. Pleasant*, 838 F.2d at

273. After the moving party discharges this burden, the nonmoving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976).

Background

Defendant, American Blast Fax, Inc., is a Texas corporation, in the business of providing fax advertising services in the state of Missouri.[3] Defendant, Fax.com Inc., is a Delaware corporation doing business out of California. It transmits advertisements from California to telephone facsimile machines in Missouri. The Missouri Attorney General brought the instant cause of action, alleging that defendants violate the TCPA by sending fax advertisements when they have not received the express invitation or permission of persons to whom copies of advertisements are faxed. Defendants filed motions to dismiss arguing that the specific provision of the TCPA regarding unsolicited fax advertisements is unconstitutional.

In an order dated April 3, 2001, the Court held that the *Central Hudson* test was the proper standard to be used in this cause of action to analyze the restrictions on commercial

[3] There has been some indication that American Blast Fax, Inc. is no longer in business, but there is nothing on the record to this effect.

speech. *See Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of NY*, 447 U.S. 557, 566 (1980). The Court also held that the Government bears the burden of justifying the restrictions on commercial speech which the TCPA imposes. *See Edenfield v. Fane*, 507 U.S. 761 (1993). Finally, the Court noted that there was no evidence before the Court satisfying this burden, but that the Court would offer the government an opportunity to meet its burden by conducting a hearing. Soon after the April 3, 2001 order, the Court notified the United States that there was going to be a hearing regarding the constitutionality of 42 U.S.C. § 227(b)(1)(C). On May 8, 2001, the Court granted the United States motion to intervene, *eo nomine*, and on behalf of the Federal Communications Commission (FCC).

A hearing was held on July 9 and 10, 2001, and counsel for Fax.com, the State of Missouri, and the United States, were all present.[4] There were two motions in limine pending at the time of the hearing which the Court indicated it would take with the case. Both motions were filed by Fax.com, the first of which requested that the Court exclude such evidence of whether unsolicited faxes are annoying or offensive. The Court at this time is going to deny this motion in limine. The Court agrees with Fax.com's recitation of the law regarding this issue; however, the Court finds that the reasons for prohibiting the sending of unsolicited faxes are relevant to its inquiry, even if those reasons are not valid under the law. The second motion requested that the Court exclude all evidence regarding Fax.com's business practices. The Court will also deny this motion. This request is considerably broad, and although, not all of Fax.com's business practices

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[4] Counsel for American Blast Fax, Incorporated withdrew March 7, 2001, and since then, no attorney has entered an appearance for American Blast Fax. After counsel's withdrawal, the Court began to send its orders directly to American Blast Fax, but all of the mail was returned. The other parties in the lawsuit have indicated that they have been unable to reach Blast Fax, and their correspondence has also been returned. At the beginning of the hearing, the Court asked if there was anyone in the courtroom who wished to appear either as counsel or as a representative of American Blast Fax, and nobody responded.

may be relevant, some of them could be, and for that reason the Court is denying the motion.

There were many objections to exhibits during the hearing, which the Court took with the case. After careful consideration of all objections to exhibits, all said objections are hereby overruled with one exception. Exhibit 2 was an apparent printout of Fax.com's web page. The State argues that it can avoid the hearsay problems associated with web sites because it is an admission by a party opponent. However, the real problem in the document was that it was missing portions of the wording on the right margin. In other words, it was an incomplete copy of the actual web page. As was demonstrated at the hearing, portions of sentences were cut off, and nobody, including the witness who had identified the document, knew what words were missing on many of the pages. Because Exhibit 2 was not a complete and accurate representation of the website, the Court will sustain Fax.com's objection to Exhibit 2. All other exhibits offered into evidence during the hearing and accepted subject to objections are now received into evidence. If the Court does not refer to some of these exhibits, it is only because the Court found them to be unpersuasive.

The State of Missouri presented five witnesses during the hearing. The first, Greg Houser, works at Pitney Bowes and sells fax machines. He also does cost analysis for his customers and he gave some testimony as to the cost of supplies in receiving faxes. He estimated that it would cost someone between 6 1/2 and 17 cents to receive a faxed advertisement depending on the type of facsimile machine.[5] However, he based these figures on retail prices, and as he admitted on cross, very few people actually pay retail prices.

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[5] These numbers were based on a variety of estimates. He estimated that one advertisement used four times as much toner as a "Slerexe" letter, and therefore, he multiplied the cost of toner for a "Slerexe" letter by four. Even the witness stressed in his testimony "it would be my estimate and it's--it is just that, an estimate, at probably somewhere around ..." and went on to give his calculation.

Large companies negotiate for much less, and small companies or those working out of the home, go to places such as Office Depot where sales are often run.

The second witness to testify for the State was Don Little, an investigator with the Missouri Attorney General's office. He identified 229 allegedly unsolicited[6] faxes which the Missouri Attorney General's office received from July 25, 2000 to June 5, 2001. These faxes were sent to five or more fax machines in the Attorney General's St. Louis offices throughout those ten and a half months. There was some question as to whether all of these faxes were advertisements as defined by the TCPA. There were some polls which did not advertise anything. There were faxes that stated "Get Paid To Enjoy Yourself" "Get Paid to Diet." These do not appear on the face to be advertising the commercial availability of property, goods, or services. There are others that were questionable, but the Court is not going to make a determination of whether they fall within the definition provided by the statute.[7]

Dan Drissell, a State Farm insurance agent, also testified for the State. He runs a small office with only three other employees, and he described the problems associated with his business in receiving unsolicited fax advertisements. He testified that the faxes tie up his phone lines for phone calls and other faxes, and that the faxes cost him money for tangible items such as paper and ink cartridges, as well as the time his staff has to spend retrieving these faxes from the fax machine. However, Mr. Drissell did not even estimate how

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[6] The witness testified that to his knowledge no one in the Attorney General's office requested these faxes, but he did not ask the people who worked in the area of the facsimile machines if they requested any of these faxes. One fax specifically stated in its transmittal line that it was "To Attorney General."

[7] Defendants argue that § 227 is void for vagueness. Although defendants arguments appear to have some merit, the Court will not address this issue. The hearing was only in regards to the *Central Hudson* standard, and the United States was not given an opportunity to address this issue.

much these unsolicited faxes cost his business per month or even per year. He also did not testify that he had received complaints from his customers of how they could not reach him by phone or fax because the lines were busy, nor did he give an example of a job he was unable to successfully complete because of the sending of an unsolicited fax. Mr. Drissell indicated that three years ago he was receiving five to ten faxes a day, but now he receives only one a day.[8]

The Court then heard testimony from Ian McLauchlan and Scott Nelson. Mr. McLauchlan owns J2 Global Communications and Mr. Nelson is employed there. J2 Global Communications offers a service where people can retrieve their faxes from their email accounts. J2 Global has approximately three million customers in the United States, four million customers worldwide. In providing fax delivery services to its customers, J2 utilizes fax servers connected to T-1 phone lines containing 24 voice channels. J2 assigns between 2,000 and 100,000 telephone facsimile numbers to one 24-channel T-1 line. When a "blast fax" occurs, the same fax is being sent to multiple fax numbers which are in sequential numbers and which come across the same T-1 line. This in turn "clogs" all 24 channels, and other people trying to send a fax would get a busy signal. Mr. McLauchlan also blamed "blast faxing" for some of their servers crashing. Mr. McLauchlan indicated that the number of telephone facsimile numbers assigned to each T-1 line depends on the grade of service which the customer signs up and pays for. For instance, the customer pays for a higher grade of service to be on a T-1 line with only 2,000 numbers. In addition, some customers do not pay anything for J2's

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[8] There is no indication what type of faxes Mr. Drissel was referring to when he said he was receiving a certain number of faxes. Counsel for the State asked "... how many faxes per day on average would you receive?" The Court can infer that the faxes were unsolicited by a couple answers later when Mr. Drissel stated that he tried "to get them stopped." However, there is no explanation if all of these faxes were advertisements or would even remotely be covered under the TCPA. *See* Tr. Transcript Vol. I, at 110.

service and these people are assigned to the lines with 100,000 numbers.[9] Mr. McLauchlan indicated that the company when making its plans for the future in replacing and upgrading its equipment, is not provisioning its servers to handle any unsolicited faxes even though he is aware that these faxes are going through the company's system.

The United States presented three witnesses. The first, was Penney Olson- Cannon, a switchboard operator at Safeco Insurance Company. Ms. Cannon testified that the sending of unsolicited faxes interrupts the business of Safeco because the faxes are sent to numbers that are not fax numbers. The fax then defaults to the switchboard, tying up the lines, and making customers wait while the operators answer these fax calls. Ms. Cannon testified that she always forwarded the fax to the company's fax machine because she believed that if she hung up, the fax would call her back.[10]

The other two witnesses called by the United States were Robert Buchner, who worked at the Florida Attorney General's office, and Mary Beth Haggerty-Shaw, who was employed at the Washington State Attorney General's Office.[11] Both witnesses said that there has been an increase in the number of complaints they have received regarding unsolicited faxes.[12] Mr. Buchner did not go into detail about

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[9] Testimony was later given by Mr. Kauffman which stated that 95% of J2's four million customers were not paying for their service suggesting that most of its customers are on the heavily populated T-1 lines. J2 makes its money from phone companies, advertisers, and from people who pay them for their customers's e-mail addresses.

[10] There was testimony that the fax machine would not have called back to the same number, but rather would have recognized that the phone number was not a fax number and would have stopped calling.

[11] Both Florida and Washington have state laws prohibiting unsolicited faxes, and so much of their testimony concerned complaints and violations of those state laws. The state laws have some overlap with the TCPA, however.

[12] Mr. Buchner indicated that over the last seven years, complaints concerning unsolicited fax advertisements increased. Ms. Shaw indicated that there had been an increase "over the past few years."

the complaints he received, or the faxes attached to the complaints. Ms. Shaw identified three faxing companies and the complaints her office received regarding these fax companies.

Ms. Shaw testified that her office received almost 100 complaints regarding 21st Century Fax. The Court reviewed these complaints, and most of the people complained about the "scams" implicated in the subject matter of the faxes. The Court reviewed the faxes attached to the complaints and found that the majority of them were polls and were not advertising anything. The other faxes stated the following: "Get Paid to Enjoy Yourself" and "Get Paid to Diet." The "scams" were suspected by the public because there was always a charge for the phone call or fax to either cast your vote or to inquire about the diet. In fact, one complaint came from a woman who wanted the faxing company to pay for her phone bill and charges for the phone call regarding the diet. The Court does not consider these faxes covered under the TCPA because they are not advertising the commercial availability of property, goods, or services. In addition, the complaints were not similar to the government's stated concerns regarding fax advertising. These people (with perhaps a few exceptions) were not complaining about these faxes costing them money and time, but rather that these faxes were scamming the public.

Ms. Shaw also testified that her office received 70 complaints regarding Fax.com, and 40-50 complaints regarding American Blast Fax. The time period for these complaints varies. Ms. Shaw testified that complaints against 21st Century covered a span of about a year. The 70 complaints regarding Fax.com began in January 1999 through April or May 2000, and the 40-50 complaints against American Blast Fax were concentrated to April and May 2000.

Defendants presented four witnesses, but the Court will not go into detail on three of them.[13] The Court would like to address the testimony of defendant's witness, Maury Kauffman.[14] Mr. Kauffman testified about future trends in the faxing industry, however, the Court would like to note, that it must rely on the facts as they exist now, rather than rely on speculation of where the faxing industry is headed. Mr. Kauffman did estimate that at the present time it costs about 2 to 3 cents to receive a normal fax. He stated that Pitney Bowes sells higher end toner, and that the numbers supplied by Mr. Houser were dealer list prices and that almost nobody buys toner at list price. Mr. Kauffman also testified that the cost of a telemarketing call to a business is greater than the cost of receiving a fax.[15] He testified that he has compared "fax to telemarketing to direct mail to magazine advertising to other types of marketing." He has determined in analyzing costs to businesses that the "receipt of a telemarketing call is higher by a magnitude" than the receipt of a fax.

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[13] Defendants do not bear the burden, and therefore, their witnesses' testimony was not as critical.

[14] Plaintiff and intervenor objected to this witness's testimony because he was tendered as an expert and they were not provided a resume and report pursuant to Federal Rule of Civil Procedure 26(a)(2). However, this was not a trial, but rather only a hearing, and under the unusual circumstances of the case, the Court held that the witness could still testify. Interestingly, the State's first witness, Mr. Houser, discussed industry standards, and gave opinions on how long it takes a fax to transmit and the cost of sending such a fax. In addition, Mr. Kauffman's testimony rebutted Mr. Houser's and Mr. McLauchlan's testimony. Finally, as the Court noted at the hearing after the witness had finished testifying, the majority of his testimony was based upon statistics and information that was available on the market. For these reasons, the Court held that the parties would not be unfairly prejudiced by Mr. Kauffman's testimony.

[15] Not only is Mr. Kauffman an expert on faxes and facsimile machines, he also happens to be involved in the Direct Marketing Association and has quite a bit of experience in the direct marketing area. He has written in many publications, as well as spoken at various marketing conferences.

Mr. Kauffman also ironically, was a consultant for J2 Global Communications for a period of time, and presently remains a stockholder in the company. He testified that many of J2's own problems regarding the "clogging" of all 24 channels, and the servers crashing, would be ameliorated if they were to "beef up" their system. In addition, Mr. Kauffman testified that J2 is in direct competition with defendants, because J2 also offers fax broadcasting. He testified that they actually have a sales force that is selling fax broadcasting, and that you can sign up for fax broadcasting on J2's website. Finally, Mr. Kauffman testified to all the advantages of fax advertising for both the businesses advertising and the consumers receiving the faxes.

Discussion

The TCPA makes it unlawful for any person "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The term "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." § 227(a)(4). The TCPA was enacted in late 1991 and is part of the Communications Act of 1934. 47 U.S.C. § 151 *et seq.* The provision prohibiting unsolicited faxes was enacted as part of a larger amendment which included restrictions on telephone solicitations and automatic dialing systems. Defendants contend that the provision prohibiting unsolicited faxes violates their freedom of speech as protected by the First Amendment.

I. Standard of Scrutiny

The government has no power to restrict expression because of its message, its ideas, its subject matter, or its content, and with respect to noncommercial speech, the Supreme Court has sustained content-based restrictions only in the most extraordinary circumstances. *Bolger v. Youngs*

Drug Prod. Corp., 463 U.S. 60, 65 (1983). However, content-based restrictions on commercial speech may be permissible. *Id.* The speech at issue in this cause of action is commercial,[16] and therefore, the Court must apply the standard which is applicable to commercial speech.

The Court previously held that the *Central Hudson* test was the proper standard to be used in this cause of action to analyze the restrictions on commercial speech. 447 U.S. at 566. This test has been referred to as an "intermediate" level of scrutiny. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

The *Central Hudson* test is as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of NY, 447 U.S. 557, 566 (1980). The Government bears the burden of identifying a substantial interest and justifying the challenged restriction. *New Orleans Broad.*, 527 U.S. at 183. It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). With this standard in mind, the Court will now turn to the circumstances of this particular cause of action.

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[16] Commercial speech is defined as "speech which does no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66. Advertisements by definition qualify as commercial speech.

II. Application of the *Central Hudson* Standard

The four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three. *New Orleans Broad.*, 527 U.S. at 183-84. It is undisputed that the expression at issue in this cause of action is afforded a level of protection under the First Amendment. Defendants' fax advertisements concern lawful activity and are not misleading.[17]

Because fax advertisements are protected under the First Amendment, the Court must first determine if the government has a substantial interest in prohibiting unsolicited fax advertisements. A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real. This burden cannot be satisfied by mere speculation or conjecture. *Edenfield*, 507 U.S. at 770-71. The Government has the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem. *Id.* at 776.

Congress identified in the legislative history, and it is argued by both the Missouri Attorney General and the United States, that the government has two interests in

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[17] The statute makes no distinction between those faxes which are misleading, and those which are not. The faxes on record that were sent by 21st Century Fax, and testified to by Ms. Shaw, might be misleading, in which case, those faxes would not be protected and the government would have unlimited authority to prohibit such faxes. There have been no allegations that the *advertisements* sent by American Blast Fax and Fax.com are misleading or concern unlawful activity. The State of Missouri originally alleged that they were misleading because it argued that the faxes lead consumers to believe that it is their responsibility to prevent unsolicited fax advertising by offering a number which consumers can call to be removed from defendants' database. However, the advertisements themselves are the commercial speech which the Court is analyzing, and as stated above, there are no allegations that the actual advertisements are misleading.

seeking to ban unsolicited fax advertisements. The first is that unsolicited junk faxing shifts advertising costs from the advertiser to the recipient. The second asserted interest is that unsolicited fax advertising occupies a recipient's facsimile machine so that the recipient cannot utilize it for his or her desired business purposes.

The Court has reviewed both the House and Senate Reports and found very little discussion on the specific provision banning unsolicited fax advertisements. S.Rep. No. 102-178 (1991), *reprinted* in 1991 U.S.C.C.A.N.1968; H.R.Rep. No. 102-317 (1991). The majority of the reports discuss telephone solicitation and automatic dialing systems. The Court also reviewed the hearing before the subcommittee on Telecommunications and Finance with similar results. *Telemarketing/Privacy Issues: Hearing Before the Subcommittee on Telecommunications and Finance of the Committee on Energy* and *Commerce House of Representatives*, 102nd Cong. (1991).

In reviewing the legislative history, Congress does express concern with the unfair shifting of advertisement costs from the advertiser to the consumer. The Senate Report states that "unsolicited calls placed to fax machines ... often impose a cost on the called party (fax messages require the called party to pay for the paper used ...)[18]." S. Rep. No. 102-178 (1991). This is the only mention of cost-shifting in its report. The House Report contained the following:

> The Committee found that when an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter. In the case of fax advertisements, however, the recipient assumes both the cost associated with the use of the facsimile machine and, the cost of the expensive paper used to print out facsimile messages. It is important to note that these costs are borne by the recipient of the fax

[18] The witnesses at the hearing appeared to agree that the cost of one sheet of paper is now half a cent.

advertisement regardless of their interest in the product or service being advertised.

H.R. Rep. 102-317.

There was also very little in the House and Senate Reports regarding the second asserted interest: that unsolicited fax advertising occupies a recipient's facsimile machine so that the recipient cannot utilize it for his or her desired business purposes. The Senate Report refers to unsolicited fax messages as "detrimental to the owner's uses of his or her fax machine," but does not explain how or why it is detrimental. *See* S.Rep. No. 102-178 (1991). The House Report contains more: "when a facsimile machine is receiving a fax, it may require several minutes or more to process and print the advertisement. During that time, the fax machine is unable to process actual business communications. Only the most sophisticated and expensive facsimile machines can process and print more than one message at a time."[19] H.R. Rep. 102-317. The Report went on to state that "businesses have begun to express concern about the interference, interruption and expense that junk fax have placed upon them." *Id.* However, it does not state how many businesses had complained, or to whom they had complained.

It is obvious from the legislative history that Congress did not consider any studies or empirical data estimating the cost of receiving a fax or the number of unsolicited fax advertisements an average business receives in a day before enacting the TCPA. Witnesses at the hearing estimated the cost of receiving one fax, and other witnesses estimated how many faxes their particular business receives on an average. However, there was no evidence as to the actual cost to a

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[19] The evidence presented at the hearing showed that it no longer takes several minutes to process a single page fax. The evidence indicated that it could take as much time as 30 seconds, but more often it takes 3 to 6 seconds to process. The "sophisticated and expensive" facsimile machines are more common now as compared to 1991, and even a lower end fax machine can hold in its memory 60 to 80 pages.

particular business over a month or a year. There were only many long hypothetical examples of how much it *could* cost a business. Mr. Drissel did not testify that these faxes were costing his business a certain amount of dollars. The Court was not told how much *he* pays for toner and paper or how fast *his* facsimile machine is, or how much memory *his* machine has.

Defendants argue that the cost is *de minimus*, and is even less than it was at the time the statute was enacted in 1991. Defendants argue that expensive paper is no longer needed, as faxes are printed on regular paper, and in some cases, paper has been eliminated all together when faxes are converted into e-mails.[20] The Court does not need to decide if defendant's assertions are correct because the government has the burden to prove that it has a substantial interest. It must prove that the harm it is trying to prevent is real and that a serious problem does in fact exist. *See Edenfield*, 507 U.S. at 770-71, 776.

Plaintiff claims that "hard evidence" on costs or numbers of unsolicited advertisements is not required. The Supreme Court has stated that "we do not ... require that empirical data come to us accompanied by a surfeit of background information ... we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even ... to justify restrictions based solely on history, consensus, and 'simple common sense'." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). However, in *Went For It* the plaintiff did submit a 106-page summary of its 2-year study, which included "data both statistical and anecdotal supporting the Bar's contentions." *Id.* at 626. The above quote was simply written in response to Justice Kennedy's dissent which

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[20] J2 Global does this for apparently three million people in the United States. There was some testimony that more companies like J2 will begin to emerge soon, and the majority of people will switch to this type of faxing. However, at the present time, most people use the standard facsimile machine and the faxes are printed out on paper.

complained that there were no copies of the actual surveys employed. *Id.* at 628. In the present case, there are not even *references* to studies that support that there is a "serious problem" which the government must address.[21] *See Edenfield*, 507 U.S. at 776.

Plaintiff also asserts that other courts addressing the provision banning unsolicited fax advertisements have found the government's interest substantial. The case law regarding the TCPA's provision banning unsolicited fax advertisements is limited. In 1994, the Oregon District Court noted the "absence of statistical data or national surveys addressing this interest," but nonetheless held that "Congress legitimately relied upon the testimony from authorities,[22] as well as contemporaneous state laws and media reports." *Destination Ventures, Ltd. v. Federal Communications Comm'n*, 844 F. Supp. 632, 637 (D. Or. 1994). It stated that "[d]espite the lack of detailed studies, there were repeated,

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[21] The only empirical studies referred to in the legislative history were in connection with telemarketing phone calls. There were no studies regarding unsolicited fax advertisements.

[22] This testimony included three witness who simply stated that junk faxes are a "nuisance." The statement by Thomas Beard, on behalf of National Association of Regulatory Utility Commissioners (NARUC), included the most extensive comment on junk faxes.

> The junk fax problem is a more recent situation and I do not believe many States have passed legislation on this issue. The junk fax advertiser is a nuisance who wants to print their ad[ ] on your paper. That call also seizes your fax machine so that it is not available for calls you want or need. The NARUC recently ran into this problem and I have attached *the ad* to this statement. As fax machines have become faster and easier to use, use of this form of communication has shown tremendous growth. Although I have seen no figures on national usage, I am judging by my own increasing reliance on the fax.
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> Hearing Before House Subcommittee on Telecommunications and Finance, 102nd Cong. 31 (1991) (emphasis added). Ironically enough, the NARUC included a resolution supporting the Act which prohibited the use of facsimile machines to send "unsolicited advertisements to persons who *specifically object*." *Id.* at 74, App. D (emphasis added). The TCPA goes farther than that and requires that the advertiser get express permission. 47 U.S.C. § 227(a)(4).

uncontradicted references made before Congress describing how facsimile advertising shifts economic burdens from the advertiser to the consumer." *Id.* The Ninth Circuit affirmed the Oregon District Court's decision but did not address the question of whether the government has a substantial interest in cost-shifting. *Destination Ventures, Ltd. v. Federal Communications Comm'n*, 46 F.3d 54, 55 (9th Cir. 1995) (the parties did not contest the government's substantial interest).

The Western District of Texas recently looked at the constitutionality of prohibiting unsolicited fax advertisements. *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000). The court simply quoted the holding of the district court in *Destination Ventures*, and held that "Blastfax's argument that Congress' hearings were not based on sufficient statistical evidence is unpersuasive." *Id.* at 1092. The only other district court which has looked at the constitutionality of this issue, did not address whether or not the government's interest was substantial. *See Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) (parties did not contest the government's substantial interest).

The Court does not find these district court cases persuasive. The Oregon court found that there were "repeated, uncontroverted *references* made before Congress." *Destination Ventures*, 844 F. Supp. at 637. However, the Court fails to see how these "references" satisfy the government's burden in showing a "serious problem." The legislative history is full of studies and statistics related to unsolicited phone calls, however, the reports are glaringly void of any statistical data in reference to unsolicited fax advertisements. H.R.Rep. No. 102-317 (1991) (looking at two telephone company studies, the increase in unlisted numbers, and looking at specifics in state law legislation regulating telemarketers).

The Court was presented with additional evidence of the government's interest in the form of witnesses and exhibits

at the hearing. The Court finds that there is a *potential* for a serious problem to arise without legislative restrictions on unsolicited faxes. However, the Court questions whether the government has met its burden in showing that there was a substantial interest at the time of enacting the TCPA, and whether there is a substantial interest at the present time.

Even if the government could meet its burden of showing a substantial interest, it cannot satisfy the other parts of the *Central Hudson* test. The Court must also look at whether the regulation directly advances the governmental interest asserted. *Central Hudson*, 447 U.S. at 566. The government must demonstrate that its restrictions will in fact alleviate the harm to a material degree. *Edenfield*, 507 U.S. at 771. In *Rubin v. Coors Brewing Co.*, the Supreme Court held that a law prohibiting the disclosure of alcohol content on beer labels did not directly advance the government's stated interest in preventing "strength wars." 514 U.S. 476 (1995). It pointed out that the law banned disclosure on beer labels but allowed it for wine and other spirits. It went on to state that "if combating strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones." *Id.* at 488.

The TCPA does not ban all unsolicited faxes, but rather only advertisements. Therefore, recipients can still bear the costs of printing others' messages, even if they strongly oppose the messages' content. The costs of printing political messages, jokes, and even some advertisements which are not included within the TCPA's definition, still fall upon the recipient. For instance, it has been held that an advertisement for job opportunities does not fall within the TCPA's definition, and therefore, is not prohibited by the statute. *See Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180 (E.D. Pa. 1994). Yet, these messages can still occupy a recipient's fax machine so that the recipient cannot use it for business purposes.

As the Supreme Court has noted, all four parts of the *Central Hudson* test are interrelated. *New Orleans Broad.*, 527 U.S. at 183-84. There is no evidence as to the number of unsolicited faxes the average business receives, and there is no breakdown as to how many of those are advertisements which fall within the TCPA's definition. The evidence at the hearing is a perfect example. Ms. Shaw had more complaints against 21st Century than she did of any other company, but those faxes were not advertising the commercial availability of property, goods or services.[23] In addition, Mr. Little had collected unsolicited faxes sent to the Missouri Attorney General's St. Louis offices, but some of those also failed to fall within the TCPA's definition. There is no evidence as to what type of unsolicited faxes are causing the harm which the government is trying to alleviate, so the Court cannot assess whether the regulation directly advances the government's interest. In addition, both the Washington and Florida Attorney General's offices testified that there was an *increase* in complaints regarding unsolicited faxes. The Court questions whether the TCPA actually advances the government's interest. If it did, the Court would assume that the complaints would decrease rather than increase.

The government also fails to satisfy the last prong of the *Central Hudson* test. The regulation cannot be more extensive than necessary. 447 U.S. at 566. The law requires there to be a "fit" between the legislature's ends and the means chosen to accomplish those ends a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480. The regulation cannot burden substantially more speech than is necessary to

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[23] Ms. Shaw testified that her office had received 100 complaints regarding 21st Century, as compared to 70 regarding Fax.com and 40-50 regarding American Blast Fax. The faxes sent from 21st Century consisted of polls and "Get Paid to Enjoy Yourself" "Get Paid to Diet" faxes.

further the government's legitimate interest. *Id.* at 478. The existence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is a relevant consideration in determining whether the "fit" between ends and means is reasonable. *Florida Bar*, 515 U.S. at 632. The availability of other options which can advance the government's asserted interest in a manner less intrusive to First Amendment rights, indicates that the regulation is more extensive than necessary. *Rubin*, 514 U.S. at 491.

Defendants offer a variety of alternatives, including a national "no- fax" database similar to those being utilized for telephone solicitations. In fact, the legislative history reveals that the House introduced legislation that would bar unsolicited fax transmissions to "any number which is on record as objecting to the receipt." *Telemarketing/Privacy Issues: Hearing Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce House of Representatives*, 102nd Cong. 4 (1991).[24] This alternative would promote the government's interest, and yet be less intrusive to First Amendment rights. Many states have looked at this problem and found less restrictive means than a complete ban on unsolicited fax advertisements.[25]

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[24] Before passing the TCPA in 1991, Congress considered several bills containing limited restrictions on sending unsolicited faxes. These restrictions were more narrowly drawn than what the TCPA presently dictates. It is unclear how or why Congress adopted the more stringent language.

[25] *See* CA Bus. & Prof. § 17538.4 (unsolicited fax advertisements must contain a toll-free number in 9 pt. type which recipient may call to indicate a desire not to receive such faxes); Tenn Code Ann. § 47-18-2501(a) (same); *Minn. Stat.* § 325E.395(a)-*(b)* (same, but also must include address where recipient can write); *Colo. Rev. Stat.* § 6-1-702(b)(I),(II) (must include a toll-free number); N.Y. Gen. Bus. § 396-aa(1) (unsolicited fax may be no longer than 5 pages and must be received between 9p.m. and 6a.m.); N.D. *Cent. Code* § 51-07-23 (same time restriction and may be no longer than 2 pages); *Or. Rev. Stat.* § 646.872(1) (faxes permitted unless recipient has sent notice that he or she does not wish to receive the faxes); R.I. Gen. Laws § 6-47-1(a)

In *City of Cincinnati v. Discovery Network, Inc.*, Cincinnati wanted to eliminate some newsracks due to safety and aesthetics. 507 U.S. 410 (1993). It decided to prohibit the distribution of commercial handbills, but allowed other publications such as newspapers. The result of the ordinance would have been a removal of 62 newsracks, while about 1,500-2,000 would remain. *Id.* at 418. The Supreme Court agreed with the District Court and the Court of Appeals that the benefit of this restriction was "minute" and "paltry," and therefore, not a proper "fit." *Id.* It held that the city's categorical ban on commercial newsracks placed too much importance on the distinction between commercial and noncommercial speech, and the distinction beared no relation to the particular interests that the city had asserted. *Id.* at 424.

Again, there is no rationality behind the government's distinction between unsolicited advertisements and other unsolicited faxes. The recipient still must bear the cost, and the fax can still interfere with the recipient's use of his or her facsimile machine for business purposes. Unlike the Supreme Court in *Discovery Network*, the Court does not know how many unsolicited faxes an average business receives in one day, nor does the Court know how many of those fall within the TCPA's definition of "advertisement." Therefore, it is difficult for the Court to determine if there is a proper "fit." If the majority of unsolicited faxes fall within the category banned by the TCPA, a proper "fit" might be present. However, the Court questions whether there is a proper fit because of the *increase* in complaints after the TCPA was enacted. It appears that the complaints regarding this problem should have decreased if in fact there was a proper "fit." The Court finds that the government fails to meet its burden of showing that a complete ban on

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(must contain toll-free number in at least 9 pt. type and in same font as body of transmission, and this information must be the first printed material on the faxes).

unsolicited advertisements is not more extensive than necessary to respond to the government's interests.[26]

The government simply fails to meet its burden of demonstrating that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *See Edenfield*, 507 U.S. at 770. Review of the legislative history reveals no evidence that there is a "serious problem," and the evidence at the hearing only reveals that there is the potential for a serious problem. The government also fails to show that the regulations are no more extensive than is necessary to serve the government's interests. Therefore, the Court holds that 47 U.S.C. § 227(b)(1)(C) is unconstitutional as it violates the First Amendment's guarantee of freedom of speech.

III. Missouri Merchandising Practices Act

The government alleges that defendants violated the Missouri Merchandising Practices Act (MPA) by "misrepresenting, directly or by implication, to Missouri consumers that the fax messages were sent in accordance with federal law, when in fact, sending of unsolicited advertisements via telephone facsimile machine violates 47 U.S.C. § 227." Complaint against American Blast Fax, ¶ 24; Complaint against Fax.com, ¶ 26. The government's argument assumes that defendants violated the provision of TCPA prohibiting unsolicited advertisement faxes. Since the Court has already decided that this provision is unconstitutional, the government's claim pursuant to the MPA must also fail.

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[26] The government argues that the TCPA is not a complete ban because it allows fax advertisements to be sent if the consumer gives express permission. However, there is no practical way for companies to gain permission. They could fax a request form to the consumer asking for permission, and forcing the consumer to fax something back to the company, but that does not seem sensible. Therefore, for all practical purposes the language of the TCPA is a complete ban on facsimile advertising.

Even if § 227(b)(1)(C) was constitutional, the MPA claim against defendants would still be dismissed for failure to state a claim. The MPA prohibits the use of misrepresentation in connection with the advertisement of any merchandise. Mo. Rev. Stat. § 407.020(1). However, the Attorney General does not allege that any of the advertisements faxed by the defendants are false or misleading. In its Response, the Attorney General alleges that defendants by sending fax advertisements, represent that they have permission to send the faxes. Response to Fax.com's Motion to Dismiss, at 19. It argues that this activity is a misrepresentation of fact, just as when an entity purposefully sends a consumer an item the consumer did not order, and then attempts to bill the consumer for the item. The Court finds this analogy unpersuasive. Even if defendants' conduct in sending unsolicited fax advertisements was found to be in violation of the TCPA, the Court fails to see how this conduct is prohibited under the MPA.

Conclusion

Applying the *Central Hudson* standard to the prohibition of unsolicited fax advertisements, the government fails to meet its burden in demonstrating that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. Furthermore, the government's claim under the MPA was based on the assumption that defendants violated the TCPA. Since the Court finds that the provision prohibiting the sending of unsolicited advertisements is unconstitutional, the MPA claim must also fail.

United States District Court
Eastern District of Missouri
Eastern Division

STATE OF MISSOURI, *ex rel.* JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL,	)	Case No. 4:00CV933 SNL
Plaintiff,	)	
vs.	)	
AMERICAN BLAST FAX, INC., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on defendant American Blast Fax, Inc.'s motion to dismiss (#9) and defendant Fax.com Inc.'s motion to dismiss.[1] The underlying lawsuit alleges that defendants violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, by sending unsolicited facsimile advertisements. Defendants contend that the TCPA violates the First Amendment right of freedom of speech.

The parties are in dispute as to what level of scrutiny should be applied in this case. Fax.com argues that the TCPA's ban on unsolicited fax advertisements is a content-based regulation, and as such must satisfy the strict scrutiny standard of review. The government has no power to restrict expression because of its message, its ideas, its subject

[1] This motion was document #16 in Case No. 4:00cv1265LOD. The cases were consolidated, but the parties were not required to re-file motions already pending in those cases. Therefore, the motion does not have a document number in the current cause of action, Case No. 4:00cv933SNL.

matter, or its content, and with respect to noncommercial speech, the Supreme Court has sustained content-based restrictions only in the most extraordinary circumstances. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65, 103 S. Ct. 2875, 2879 (1983). However, content-based restrictions on commercial speech may be permissible. *Id.* The Court agrees that the restriction at issue is content-based; however, because the speech is commercial[2], the Court must apply the standard which is applicable to commercial speech.

The parties also disagree as to what is the proper standard when evaluating the constitutionality of a law regulating commercial speech. In 1980, the Supreme Court set forth a four-part test that was to be used in analyzing restrictions on commercial speech. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of NY*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980). The *Central Hudson* test has been referred to as an "intermediate" level of scrutiny. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S. Ct. 2371, 2375-76 (1995). The Attorney General contends that this is still the same standard applicable today. Defendants, however, argue that truthful, non-misleading commercial speech is now entitled to a higher standard of review similar to that imposed for noncommercial speech. They use as support a 1996 Supreme Court plurality decision. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996). Fax.com admits, as a plurality decision, *44 Liquormart* did not overturn *Central Hudson*, but it argues that the Justices were unanimous in applying a higher standard.[3] However, it is very clear they did not

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[2] Commercial speech is defined as "speech which does no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66, 103 S. Ct. at 2880. Advertisements by definition qualify as commercial speech.

[3] The Court does not fully agree with this assertion. Justice Scalia stated that he shared Justice Thomas's "discomfort with the *Central Hudson* test," but that he was "not disposed to develop new law, or reinforce the old, on this issue." 517 U.S. at 517-18, 116 S.Ct. at 1515 (Scalia, J., concurring in part and concurring in judgment). Justice O'Connor actually did apply the *Central Hudson* test in her opinion, 517 U.S. at 528, 116 S.Ct. at 1520 (O'Connor, J., concurring in the judgment), even

unanimously agree as to what standard should apply. Furthermore, since *44 Liquormart* the Supreme Court has continued to apply the *Central Hudson* analysis in commercial speech cases. *See, Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183-84, 119 S. Ct. 1923, 1930 (1999).

Many judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech. *New Orleans Broad.*, 527 U.S. at 184, 119 S. Ct. at 1930. This change might occur in the near future as evidenced by the multiple opinions in *44 Liquormart*. However, as the law stands today, *Central Hudson* is still the standard which the Court must follow in determining the validity of laws regulating commercial speech.

The *Central Hudson* four-part test is as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of NY, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980). In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction. *New Orleans Broad.*, 527 U.S. at 183, 199 S. Ct. at 1930. It is well established that the party

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though, Justice Thomas implied that she in actuality used a stricter application of *Central Hudson*, 517 U.S. at 524, 116 S. Ct. 1519 (Justice Thomas concurring).

seeking to uphold a restriction on commercial speech carries the burden of justifying it. *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S. Ct. 1792, 1800 (1993). This burden is not satisfied by mere speculation or conjecture; rather, the government must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Id.*

There is no evidence before the Court satisfying this burden, because this is a motion to dismiss, and as such the Court can only consider what is in the pleadings. Therefore, the Court will offer the government in opportunity to meet its burden by conducting a hearing on May9, 2001, at 9:00 a.m.

Accordingly,

IT IS HEREBY ORDERED that a hearing will be held **May 9, 2001, at 9:30 a.m.**, to determine if the government can satisfy the four-part analysis as set out in *Central Hudson*.

Dated this 3rd Day of April, 2001.

/s/ Stephen N. Limbaugh
SENIOR UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 3 - 2003
OFFICE OF THE CLERK

NO. 03-507

IN THE
SUPREME COURT OF THE UNITED STATES

FAX.COM, INC.
Petitioner,

v.

STATE OF MISSOURI EX REL.
JEREMIAH W. (JAY) NIXON, *et al.*
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT ATTORNEY GENERAL OF MISSOURI IN OPPOSITION

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QUESTION PRESENTED

Can Congress, without violating the First Amendment, bar commercial advertisers from electronically entering homes and businesses and using facsimile machines located there to print their advertisements, with the recipient bearing the cost of that use, unless the recipient indicates a willingness to do so?

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STATEMENT

The Attorney General of Missouri seeks to use his authority under the Telephone Consumer Protection Act ("TCPA") to prevent "fax blasting," *i.e.*, the indiscriminate sending of unsolicited advertising via facsimile transmission to homes and businesses. Bringing suit against petitioner Fax.com and another "fax blaster," the Attorney General invoked 47 U.S.C. § 227(b)(1)(C), which bars any person from sending "an unsolicited advertisement to a telephone facsimile machine." State attorneys general are authorized to file such enforcement suits by 47 U.S.C. § 227(f)(1).

1. Prior to the arrival of the automobile and electronic communications, many Americans undoubtedly welcomed the diversion and service of the door-to-door salesman. The isolated farmer would relish not just the availability of goods or services, but the chance to gather news. Long before the days of mass retailers and automobiles, even a wealthy citydweller saw a benefit from those who would come to the door with their goods. Whether on the farm or in town, the person who wished to avoid the interference of the salesman simply declined his approach – or perhaps looked through a peephole and never opened the door. It was – and is – possible, when facing the prospect of a door-to-door salesman, to avoid any expense by immediately distinguishing between the desired and the undesired messenger or message.

Improved postal services created another means of reaching individual homes and businesses. Thus we have today a great "direct mail" industry, filling

American mailboxes with everything from unsolicited credit card applications to magazine subscription offers. The burden on the recipient is comparable to that of the person looking through the peephole; the recipient can simply take the unwanted mail on "the 'short, though regular, journey from mail box to trash can.'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983), quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F.Supp. 880, 883 (S.D. N.Y. summarily aff'd, 386 F.2d 449 (2d Cir. 1967), cert. denied, 391 U.S. 915 (1968).

Direct mail and door-to-door selling have one important common characteristic: in each, the cost is borne entirely by the marketer; recipients pay nothing for the messages they may or may not want to receive.

The 20th Century brought new, electronic methods of delivering a commercial message to a home – most of which share the "no monetary cost to recipient" characteristic. Among them, radio and then television quickly became a significant, if not dominant, means of sending marketing messages into homes. Targeted recipients remained able to turn off the receiver or change the channel, without cost, to avoid an unwanted message.

Late in the 20th Century, marketers also turned to the telephone as a means of reaching into homes – and into businesses, where radios and televisions might not be present. "Telemarketing" has become increasingly problematic as its use has increased. Thus the petitioner correctly observes that a principal reason for passage of the TCPA was "public concern over the

BEST AVAILA

growing number of unwanted telephone solicitations." Pet. at 3. Direct mail, though annoying, had an impact on recipients only when they, at their own convenience, picked up letters and decided which ones to discard. But telephone calls interrupted personal lives and business activities on the schedule of the telemarketer. Where the recipient of mail could look at the envelope and (usually) determine whether it was worth opening, the anonymity of the telephone ring – and the possibility of an important personal or business message – demands that the recipient quickly pick up the receiver and listen.

As the number of telemarketing calls has increased, states have moved to stricter means of reducing the burden of their intrusions into homes and businesses, setting up "do not call" programs: lists of numbers that telemarketers cannot call without penalty. The federal government has recently taken that same path – a choice that is being challenged. *See Federal Trade Comm'n v. Mainstream Marketing Serv., Inc.*, 345 F.3d 850 (10th Cir. 2003).

Despite the considerable personal and business costs of unwanted telemarketing calls, that means of marketing retains a key characteristic common to door-to-door selling and mail solicitations: the recipient bears no monetary cost. This case is distinguishable from those addressing such "free" means of communication.

2. The Attorney General of Missouri filed suit against petitioner Fax.com, alleging that Fax.com "engag[ed] in a pattern or practice of sending unsolicited faxes, via facsimile transmission, computer, or

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other device to facsimile machines located in Missouri." Complaint (Docket 1) at 4. Recipients, including the State of Missouri, "receive multiple unsolicited fax advertisements from Fax.com." *Id.* at 3. The receipt of those advertisements "causes the recipients to pay for paper and toner, which otherwise would have been used to receive requested messages." *Id.* at 4. The receipt of these advertisements also "prevents other requested messages from being received and requires additional labor to handle the unsolicited messages." *Id.*

Throughout this litigation, there has never been any dispute that petitioner "provide[s] promotional services by transmitting client advertisements to the fax machines of potential customers." Petition Appendix (Pet. App.) at 4a. Nor has there been any dispute that "unsolicited fax advertising shifts costs to the recipients who are forced to contribute ink, paper, wear on their fax machines, as well as personal time" to the advertiser's purposes. *Id.* *See also id.* at 32a. Fax.com's principal rebuttal to these points was "that the cost is *de minimus*." *Id.* at 34a.

Petitioner moved to dismiss the complaint, arguing that "the TCPA violates the First Amendment right to freedom of speech." *Id.* at 20a. (Docket 9) That constitutional attack prompted the United States to intervene. (Docket 38) The district court determined that because the TCPA regulated commercial speech, its constitutionality would be determined under the test articulated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Pet. App. 45a. The court determined

that proper application of the *Central Hudson* test would require giving "the government an opportunity to meet its burden" in an evidentiary hearing. Pet. App. 46a. At that hearing, the Attorney General and the United States presented witnesses who testified concerning the impact – monetary and otherwise – of unsolicited fax advertising. Pet. App. 23a-27a.

The district court did not make formal findings of fact. But it held that the "government simply fails to meet its burden of demonstrating that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Pet. App. 41a. The U.S. Court of Appeals for the Eighth Circuit reversed. That court, too, applied *Central Hudson*. Pet. App. 6a. But it "conclude[d] that the Government has demonstrated a substantial interest in restricting fax advertisements in order to prevent cost shifting and interference such unwarranted advertising places on the recipient." Pet. App. 9a.

ARGUMENT

The increasing use and impact of electronic marketing tools make the constitutionality of the TCPA – and the broader issue of the proper application of the First Amendment and of *Central Hudson* – "of great importance." Pet. at 26. Questions similar to the one presented here are already being litigated in connection with "no-call" lists that address telemarketers using telephone services. *See Federal Trade Comm'n v. Mainstream Marketing Serv., Inc.*, 345 F.3d at 860. But the petitioner is wrong in asserting that the Eighth Circuit's decision, as important as it is,

demands this Court's attention now. It does not directly conflict with any other decision by this or any other court. There is no valid reason to suppose that if such a conflict arises, it will evade review. And the speech involved here presents a different threat than does the speech that led to the restrictions at issue in the cases petitioner cites.

1. Petitioner concedes that this and other cases "have yet to generate a deep split of authority over the specific issue of the constitutionality of the TCPA's fax restrictions." Pet. at 28. In making that concession, petitioner provides a rationale that suggests, in its view, that any such split is unlikely to reach this Court. Petitioner points out that because private TCPA suits must be filed in state courts, "few federal circuits will be asked to pass on the issues raised here," and claims that "many" of those state courts "will defer in practice to federal courts on issues of federal law." *Id.* Petitioner certainly overstates the willingness of state courts to follow the precedent set by a single federal circuit, particularly when, as petitioner then explains, such vast sums are involved – sums that will ensure representation by excellent counsel and the presentation of well-developed factual records. Moreover, petitioner's argument ignores the origin of this very case: a suit *by a state attorney general in federal court*. There is no reason whatever to suppose that other attorneys general will not bring their own suits. Indeed, other attorneys general have done so. *E.g.*, *Minnesota ex rel. Hatch v. Sunbelt Communications & Marketing*, 2002 WL 32156843 (D. Minn. 2002); *Texas v. American Blastfax, Inc.*, 164 F.Supp.2d 892 (W.D. Tex. 2001).

Petitioner also belittles the possibility of individual suits, as opposed to class actions, brought under 47 U.S.C. § 227(b)(3). Pet. App. at 28. Petitioner's calculation of a $1500 maximum award – and its conclusion that individuals have no real incentive to sue on their own – is based on the allowance of a $500 per violation award in § 227(b)(3)(B), trebled pursuant to § 227(b)(3)(C). But it assumes that the individual brings suit over a single violation. Frankly, if each "fax blaster" hit each recipient (*i.e.*, each potential plaintiff) just once, the TCPA would not address "blast faxing." It was the multiple intrusions by companies such as American BlastFax and Fax.com that prompted congressional action. When a particular person or company receives its tenth unsolicited fax from Fax.com, the potential recovery reaches $15,000. And as Fax.com continues to impose on that recipient's machinery, time, paper, and supplies, the amount – and the potential for individual, non-class action suits – continues to grow. Indeed, the very nature of the "blast faxing" — the business petitioner is attempting to protect – ensures that there will be individuals with an adequate incentive to sue on their own behalf.

2. In addition to claiming that not enough cases will be brought to create a "deep split" of the sort that often merits the grant of a writ of certiorari, petitioner asserts that cases will disappear as defendants settle, making this "one of the rare opportunities for the Court to address" the issues presented here. Pet. at 28-29. That claim is based on the explicit assumption that fax blasters will go out of business rather than post bonds and appeal. That assumption is unsubstantiated (except with a single unproven anecdote). But notably,

it is not enough, even if true, to make petitioner's point.

Petitioner's point depends on three additional, implicit assumptions: that the bulk of the cases – and, indeed, the key cases – will be brought in state courts; that there the fax blasters will have no ability to appeal prior to final judgment; and that if they do appeal after final judgment, they will have to post crippling bonds. Petitioner supports none of these assumptions with explanation or authority. And they ignore the wide range of state practices. *See*, *e.g.*, Renée Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 St. Mary's L. J. 729, 754 (1998) ("[T]hough many states have interlocutory appeal rules that are as restrictive as the federal model, others broadly permit interlocutory appeals. States like New York, Massachusetts, and Alaska have adopted the broadest rules permitting interlocutory appeal. In fact, a New York litigant can appeal almost any order that involves some part of the merits of the case or that affects a substantial right."). Indeed, there have been interlocutory appeals in state courts in private TCPA suits. *E.g.*, *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. App. 2000). There are myriad possibilities for these questions to be addressed on appeal, as they were here, before an adverse final judgment that allegedly carries a threat of economic disaster.

3. It is not enough for the petitioner to cite free speech cases generally, then claim that the Eighth Circuit's decision conflicts with them. This case deals with a form of communication that enters a home or business unbidden, then uses the recipient's resources

before the recipient even knows from whom the message is coming, much less its content. That distinguishes it from the lines of precedent petitioner cites.

More than 30 years ago the Court "categorically reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another." *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970). Since *Rowan*, this Court has reaffirmed that "the intrusion of speech into the home" is constitutionally significant. *Frisby v. Schultz*, 487 U.S. 474, 492-93 (1988). *See also Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 176 (2002) (Rehnquist, C.J., dissenting) (distinguishing between "speech taking place on another citizen's private property [and] speech taking place in public forums"). Petitioner does not attempt to deal directly with this distinction.

Petitioner does address it in a backhanded way, though only to belittle it. Petitioner asserts that "[f]axes, unlike calls, are received primarily by businesses," Pet. at 10, and again, that "most faxes are received" "in a business setting," Pet. at 11. Petitioner provides no support for that conclusion. Nor does petitioner account for the need that even businesses have for privacy – after all, businesses do not put their fax machines in areas accessible to the public. Nor does petitioner, in its reiteration of a series of alternative regulatory proposals, suggest a plan that would track that distinction, *e.g.*, a ban only on unsolicited faxes being sent into homes. That omission is not likely the result of inadvertence. It may be that petitioner does not want to distinguish between residential and business fax numbers. Or perhaps the distinction is

not feasible, either for technological reasons, or because of the huge number of home-based businesses and telecommuters. But so long as that distinction is not made, petitioner cannot entirely evade the *Rowan* declaration.

Moreover, none of the cases petitioner cites involve means of communication that impose direct monetary costs on recipients. Never has this Court suggested, much less held, that a person has a right to speak at his listener's expense. The cost for each individual fax may be small,[1] but it is a real cost, borne by real people. To date there is no split of authority as to the proper First Amendment analysis in a case where costs are imposed on listeners. Until there is such a split, there is no need for this Court to take up petitioner's cause.

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[1] It is not as small as petitioner suggests, however. Petitioner would have the Court conclude that it is only "a half-cent per page." Pet at 2. But the authority petitioner cites merely gives the current cost of paper as a half-cent per page. Pet. App. 32 n. 18. Anyone who has ever replaced a printer or fax machine, or purchased toner, ink, or other supplies, knows that paper, though a significant portion of the cost, is not the only expense.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

Respectfully submitted,

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No. 03-507

In the Supreme Court of the United States

FAX.COM, INC., PETITIONER

v.

STATE OF MISSOURI, EX REL.
JEREMIAH W. (JAY) NIXON,
ATTORNEY GENERAL OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 47 U.S.C. 227(b)(1)(C), the provision of the Telephone Consumer Protection Act of 1991 that prohibits the transmission of unsolicited commercial advertisements to a telephone facsimile machine, violates the First Amendment.

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In the Supreme Court of the United States

No. 03-507

FAX.COM, INC., PETITIONER

v.

STATE OF MISSOURI, EX REL.
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ATTORNEY GENERAL OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 323 F.3d 649. The opinion of the district court (Pet. App. 19a-42a) is reported at 196 F. Supp. 2d 920.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2003. A petition for rehearing was denied on July 3, 2003 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, § 3(a), 105 Stat. 2395, to address problems arising out of technological advances in telemarketing and fax advertising. The TCPA, which was the culmination of three years of legislative proposals and hearings,[1] imposed restrictions on a variety of advertising practices, including unsolicited fax advertising and telephone soliciting using automated dialing and prerecorded message systems. See 47 U.S.C. 227(b)(1).

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[1] The One Hundred First Congress considered four bills addressing telemarketing practices. See H.R. 628, 101st Cong., 1st Sess. (1989); H.R. 2131, 101st Cong., 1st Sess. (1989); H.R. 2184, 101st Cong., 1st Sess. (1989); H.R. 2921, 101st Cong., 1st Sess. (1989); *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131 and H.R. 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989) (*1989 House Hearing*). The One Hundred Second Congress, which enacted the TCPA, considered six bills. See H.R. 1304, 102d Cong., 1st Sess. (1991); H.R. 1305, 102d Cong., 1st Sess. (1991); H.R. 1589, 102d Cong., 1st Sess. (1991); S. 1410, 102d Cong., 1st Sess. (1991); S. 1442, 102d Cong., 1st Sess. (1991); S. 1462, 102d Cong., 1st Sess. (1991); *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, The Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. (1991) (*1991 Senate Hearing*); *Telemarketing/Privacy Issues: Hearing on H.R. 1304 and H.R. 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991) (*1991 House Hearing*); S. Rep. No. 177, 102d Cong., 1st Sess. (1991); S. Rep. No. 178, 102d Cong., 1st Sess. (1991); H.R. Rep. No. 317, 102d Cong., 1st Sess. (1991). The final bill that became the TCPA combined features of H.R. 1304, S. 1410, and S. 1462.

As relevant here, the TCPA prohibits the use of a "telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. 227(b)(1)(C). An "unsolicited advertisement" is defined as an advertisement of "the commercial availability or quality of any property, goods, or services" that is transmitted without the recipient's "prior express invitation or permission." 47 U.S.C. 227(a)(4).

Section 227(b)(1)(C) was intended to protect recipients against the costs and inconveniences resulting from the transmission of unwanted fax advertising. As the House Report recognized, because fax machines "are designed to accept, process, and print all messages which arrive over their dedicated lines," fax advertising imposes burdens on unwilling recipients distinct from the burdens imposed by traditional advertising. H.R. Rep. No. 317, 102d Cong., 1st Sess. 10 (1991). Unlike recipients of advertising sent by regular mail, recipients of fax advertising must pay the costs to produce the advertisement, including "both the cost associated with the use of the facsimile machine and, the cost of the expensive paper used to print out facsimile messages." *Id.* at 25. Moreover, while the fax advertisement is being printed, recipients are typically unable to use their fax machines to send or receive other messages. *Ibid.* The Senate Report thus concluded that requiring advertisers to obtain recipients' consent before sending fax advertising was "necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine." S. Rep. No. 178, 102d Cong., 1st Sess. 8 (1991).

The TCPA authorizes the Attorney General of a State (or other designated state official) to sue to enjoin

a pattern or practice of transmissions to residents of the State in violation of the TCPA. 47 U.S.C. 227(f)(1). The TCPA also creates a private right of action in state court to enforce its provisions "if otherwise permitted by the laws or rules of court of a State." 47 U.S.C. 227(b)(3). In either variety of suit, the plaintiff may obtain injunctive relief and recover actual monetary loss or $500 per violation, whichever is greater; in cases involving willful or knowing violations, treble damages may be recovered. 47 U.S.C. 227(b)(3) and (f)(1).

2. After having received "numerous consumer complaints," the State of Missouri brought suit against petitioner, alleging that petitioner was engaged in a pattern or practice of sending unsolicited fax advertisements in violation of 47 U.S.C. 227(b)(1)(C). Pet. App. 4a.[2] Petitioner moved to dismiss the State's complaint, contending that Section 227(b)(1)(C) violates the First Amendment. The State's suit against petitioner was consolidated with the State's suit against a second fax advertiser. The United States intervened to defend the constitutionality of the TCPA.

The district court, after conducting an evidentiary hearing, held that Section 227(b)(1)(C) violates the First Amendment. Pet. App. 19a-42a. The court applied the "'intermediate' level of scrutiny" standard articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 563-566 (1980), which considers whether a regulation of truthful commercial speech is addressed to a substantial govern-

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[2] In addition, the Federal Communications Commission has issued a Notice of Apparent Liability for Forfeiture against petitioner for allegedly having violated Section 227(b)(1)(C) on 489 occasions. *In re Fax.com, Inc.*, 17 F.C.C.R. 15,927 (2002). That proceeding remains pending.

ment interest, directly advances that interest, and is narrowly tailored. Pet. App. 30a. After "question[ing]" whether the government has any substantial interest in restricting unsolicited faxes, the court held that Section 227(b)(1)(C) does not directly advance that interest, noting that the provision applies only to unsolicited advertisements, not to other unsolicited material sent by fax. *Id.* at 37a. The court also held that Section 227(b)(1)(C) is not sufficiently narrowly tailored, because Congress could have advanced its interests by "less intrusive" means, such as by establishing "a national 'no-fax' database." *Id.* at 39a.

3. The court of appeals reversed. Pet. App. 2a-18a. Like the district court, the court of appeals analyzed Section 227(b)(1)(C) under the *Central Hudson* standard. Unlike the district court, however, the court of appeals upheld Section 227(b)(1)(C) as a permissible regulation of commercial speech.

First, the court of appeals concluded that Section 227(b)(1)(C) serves "a substantial interest" in protecting owners of fax machines against "cost shifting and interference" caused by unsolicited fax advertising. Pet. App. 9a. The court found ample evidence in the congressional hearings that preceded the TCPA's enactment of "the potential harm of unrestrained fax advertising," including testimony that recipients did not want to have their fax machines tied up and their fax supplies used by advertisers sending unsolicited faxes. *Id.* at 7a-8a. The court also noted that the evidence introduced in the district court demonstrated that "the harms of unsolicited fax advertising are real and have not been eliminated by technological changes" since the TCPA's enactment. *Id.* at 8a.

Second, the court of appeals concluded that Section 227(b)(1)(C) "directly and materially advances the

asserted governmental interest" in preventing cost-shifting to recipients of unsolicited fax advertising and interference with those recipients' use of their fax machines. Pet. App. 14a. The court held that Congress was not constitutionally required to prohibit all unsolicited fax transmissions, whether commercial or not, in order to advance that interest, finding "no reason to doubt that Congress * * * believed * * * that noncommercial faxes did not present the same problem as commercial faxes." *Id.* at 10a. The court also held that Congress need not impose identical prohibitions on other varieties of unsolicited advertising such as live telemarketing calls. *Id.* at 14a.

Finally, the court of appeals concluded that Section 227(b)(1)(C) "achieves a reasonable fit between the means it adopts and the ends it seeks to serve." Pet. App. 17a. The court explained that "[a]dvertisers remain free to publicize their products through any legal means," including by faxes sent with the recipient's consent. *Id.* at 15a. "Given the cost shifting and interference imposed by unsolicited commercial faxes and the many alternatives left available to advertisers," the court observed, "TCPA's approach is 'in proportion to the interest served . . . [and is] narrowly tailored to achieve the desired objective.'" *Id.* at 15a-16a (quoting *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 632 (1995), and *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989)).

ARGUMENT

The court of appeals correctly held that 47 U.S.C. 227(b)(1)(C), which prohibits the transmission of advertisements to telephone fax machines without the recipient's consent, is a constitutional regulation of commercial speech. The court of appeals' decision is

consistent with the decisions of this Court considering First Amendment challenges to various commercial speech regulations, as well as with the decisions of all of the other appellate courts that have considered First Amendment challenges to Section 227(b)(1)(C) itself. This Court's review is, therefore, not warranted.

I. THE TCPA'S PROHIBITION OF UNSOLICITED FAX ADVERTISING IS A CONSTITUTIONALLY PERMISSIBLE REGULATION OF COMMERCIAL SPEECH UNDER THE STANDARD ARTICULATED BY THIS COURT

This Court has recognized that regulations of commercial speech are valid as long as they are addressed to a substantial governmental interest, directly advance that interest, and are narrowly tailored. See *Board of Trustees* v. *Fox*, 492 U.S. 469, 475-480 (1989); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-666 (1980). As the Court has explained, that standard does not require a legislature to employ "the least restrictive means" of regulation or to achieve a perfect fit between means and ends. *Fox*, 492 U.S. at 480. It is sufficient that the legislature achieve a "reasonable" fit by adopting regulations "in proportion to the interest served." *Ibid.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). Section 227(b)(1)(C) easily satisfies that standard.

A. The Government Has A Substantial Interest In Protecting Individuals And Businesses From Having Their Fax Machines And Supplies Used Without Their Consent By Fax Advertisers

1. As the court of appeals recognized, the government has "a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising

places on the recipient." Pet. App. 9a; accord, *e.g.*, *Destination Ventures, Ltd.* v. *FCC*, 46 F.3d 54, 56 (9th Cir. 1995) (acknowledging "the government's substantial interest in preventing the shifting of advertising costs to consumers" through unsolicited fax advertising).

In reaching that conclusion, the court of appeals examined the extensive record before Congress documenting the increasingly pervasive "'junk fax' problem." Pet. App. 7a. Witnesses informed Congress that unwanted fax advertisements consumed recipients' fax paper and prevented recipients from using their fax machines to send or receive other faxes. See *id.* at 7a-8a. Congress was told that the problem was a potentially massive one, because, for example, "at least one fax advertiser could 'routinely send[] 60,000 fax advertisements per week.'" *Id.* at 7a. Congress was also advised that, although a number of States had enacted or were considering enacting legislation to restrict unsolicited fax advertising, national legislation was needed to provide "a full solution to a problem likely 'to grow' in scale." *Ibid.* (quoting *1989 House Hearing* 83).[3]

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[3] See, *e.g.*, *1991 House Hearing* 31 (statement of Thomas Beard, Chairman, Florida Public Service Commission, on behalf of National Association of Regulatory Utility Commissioners) (observing that "[t]he junk fax advertiser is a nuisance who wants to print [its] ad[] on your paper" and whose "call also seizes your fax machine so that it is not available for calls you want or need"); *id.* at 47 (statement of Janlori Goldman, American Civil Liberties Union) (stating that the proposed restrictions on unsolicited fax advertisements could be justified "because of the burden that is placed on the individual who has to pay for the cost of the communication"); *1991 Senate Hearing* 41 (statement of Michael Jacobson, Center for the Study of Commercialism) (stating that unsolicited fax advertisements "not only use the recipient's paper,

The court of appeals also observed that the evidence introduced in the district court confirmed that "the costs and amount of interference resulting from unrestrained fax advertising continue to be significant." Pet. App. 8a. Such evidence established, among other things, that unsolicited fax advertising can cost the recipient more than $100 a year in paper and other supplies, that most fax machines still cannot send or receive more than one transmission at a time, and that unsolicited fax advertising "interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems." *Ibid.*

Based upon the evidence before Congress and the district court, as well as "simple common sense," *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quoting *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992)), the court of appeals correctly concluded there is "a substantial governmental interest in protecting the public from the cost shifting and interference caused by unwanted fax advertisements." Pet. App. 17a-18a. It is that substantial government interest that justifies Section 227(b)(1)(C).

2. Petitioner does not, and cannot, identify any decision of this Court that suggests, much less holds, that an advertiser has a First Amendment right to appropriate individuals' and businesses' equipment, paper, and ink, without their consent, for the dissemination of its own advertising. And, consequently, petitioner does not, and cannot, identify any decision of this Court that casts doubt on the substantiality of the government's interest in protecting against such appropriation.

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but also prevent faxes from being sent out and prevent legitimate faxes from coming in").

More generally, the Court has recognized the government's important interest in protecting captive audiences against expressive activity of an unduly intrusive nature. See, *e.g.*, *Hill* v. *Colorado*, 530 U.S. 703, 715-718 (2000); *Florida Bar*, 515 U.S. at 624-625; *Frisby* v. *Schultz*, 487 U.S. 474, 484-485 (1988); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748-749 (1978); *Rowan* v. *Post Office Dep't*, 397 U.S. 728, 735-738 (1970). If, as the Court has recognized, the government may restrict even political protest in order to protect against interference with the peaceful enjoyment of one's own home, see, *e.g.*, *Frisby*, 487 U.S. at 487-489, the government surely may restrict unsolicited fax advertising in order to protect against interference with the use of one's own fax machine and its supplies. As the Court observed in *Rowan*, "[t]o hold less would tend to license a form of trespass" or conversion, because any "asserted right of a mailer * * * stops at the outer boundary of every person's domain," 397 U.S. at 737, 738.

Contrary to petitioner's suggestion, the governmental interest underlying Section 227(b)(1)(C) is not the "suppress[ion]" of "unpopular[] * * * speech" (Pet. 11), in the sense of restricting the *content* of speech, as distinguished from its *mode* of dissemination. Congress's concern was with preventing advertisers from engaging in conduct that tied up recipients' fax machines and expended their paper and other supplies. See Pet. App. 7a-9a; cf. *1989 House Hearing* 2 (statement of Rep. Edward J. Markey, Chairman of the Subcommittee) (observing that "receiving a junk fax is like getting junk mail with the postage due"). Congress left advertisers free to convey their messages by other modes—including television and radio, newspapers, billboards, leaflets, bulk mail, and (subject to certain constraints) telephone—as well as by fax with the

recipient's consent. Petitioner's reliance on *United States* v. *Eichman*, 496 U.S. 310, 318 (1990), and *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71-72 (1983), is consequently misplaced, because those cases involved restrictions designed to restrict the speaker's message.

B. Section 227(b)(1)(C) Directly Advances The Government's Interest In Preventing Cost-Shifting And Interference With Owners' Use Of Their Fax Machines

The court of appeals also correctly concluded that the prohibition on unsolicited fax advertising in Section 227(b)(1)(C) "directly and materially advances" the government's interest in protecting fax machine owners from the costs and other burdens of unsolicited faxes. Pet. App. 14a. Contrary to petitioner's assertions (see Pet. 8-12), that conclusion is not undermined by Congress's choice to prohibit only unsolicited advertising, and not other unsolicited messages sent by fax.

As the court of appeals explained, because the record before Congress demonstrated that advertisers were "responsible for a large portion of the problem" arising from unsolicited fax transmissions, Congress could advance its interests by focusing on fax advertising exclusively. Pet. App. 13a-14a; see *Kaufman* v. *ACS Sys., Inc.*, 2 Cal. Rptr. 3d 296, 319 (Ct. App. 2003) ("When Congress addressed the issue of unsolicited faxes, the evidence indicated that the source of the problem was *advertisements that offered 'all kinds of products and services.'*") (quoting 137 Cong. Rec. 18,123 (1991) (statement of Sen. Fritz Hollings)); cf. 5/23/03 Report and Recommendation at 8, *Texas* v. *Fax.com, Inc.*, No. A-02-CA-080 JN (W.D. Tex. approved June 18, 2003) (noting that at least 500 million unsolicited fax ad-

vertisements are sent annually). This Court has recognized that "the Government [is not required to] make progress on every front before it can make progress on any front." *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993).

The Court's decision in *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), does not, as petitioner suggests, require Congress to restrict *all* unsolicited fax transmissions in order to address a problem confined principally to unsolicited fax advertising. See Pet. 9. In *Discovery Network*, the Court invalidated a city ordinance, purportedly intended to address aesthetic and safety concerns, that prohibited newsracks that dispensed commercial handbills but permitted all other newsracks. The Court explained that the ordinance could have "only a minimal impact" on aesthetics and safety because it resulted in the removal of just 62 newsracks, while leaving 1500 to 2000 newsracks in place. 507 U.S. at 414, 418. For that reason, the Court concluded that the ordinance's distinction between commercial and noncommercial newsracks bore "no relationship *whatsoever*" to the city's asserted interests, and therefore could not be justified. *Id.* at 424. That concededly "narrow" holding, *ibid.*, does not have any application here.

Unsolicited fax advertisements constitute the bulk of all unsolicited faxes, just as commercial telephone solicitations "constitute the bulk of all telemarketing calls." Pet. App. 13a (citing H.R. Rep. No. 317, *supra*, at 16). Congress thus had a reasonable basis for concluding that the problem resulting from unsolicited fax transmissions would be directly and materially ameliorated by restricting fax advertising. *Discovery Network* does not bar the government from focusing on the principal source of the problem, and thereby according greater

latitude to noncommercial speech than to commercial speech. See Pet. App. 10a n.4; cf. *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150, 165 (2002) (suggesting that ban on door-to-door solicitation, which was intended to protect residents' privacy and prevent fraud, would be permissible if limited to commercial solicitations); *City of Ladue* v. *Gilleo*, 512 U.S. 43, 58 n.17 (1994) (observing that "[d]ifferent considerations might well apply" to a ban on off-site commercial advertisements on residential property as distinguished from the ban on political signs at issue in that case).

Nor do the Court's decisions in cases such as *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173 (1999), and *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), provide any assistance to petitioner. See Pet. 8. In those cases, the government sought to justify restrictions on the advertising of casino gambling (in *Greater New Orleans*) and the labeling of beverages with high alcohol content (in *Coors*) based on its interest in suppressing demand for the products being advertised. The Court reasoned that, because the applicable "regulatory regime" in each case was "pierced by exemptions and inconsistencies," there was "little chance" that the speech restriction at issue could "directly and materially advance[] its aim." *Greater New Orleans*, 527 U.S. at 190, 193 (quoting *Coors*, 514 U.S. at 489). That is not the case here. Because Section 227(b)(1)(C) reaches the vast majority of unsolicited fax solicitations, there is every reason to believe that Section 227(b)(1)(C) will materially advance the govern-

ment's aim of deterring cost-shifting and interference with the owner's use of his fax machine.[4]

C. Section 227(b)(1)(C) Is Narrowly Tailored To Advance The Government's Interest

The court of appeals finally held that Section 227(b)(1)(C)'s prohibition of unsolicited fax advertisements "achieves a reasonable fit between the means it adopts and the ends it seeks to serve." Pet. App. 17a. That conclusion, too, is correct.

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[4] As the court of appeals recognized, Congress also had evidence before it that unsolicited fax advertisements were more burdensome and intrusive than unsolicited faxes of other types, which were less likely to be unwanted. Pet. App. 10a (citing H.R. Rep. No. 317, *supra*, at 16). Petitioner contends that "privacy-based interests" should be disregarded in this context, because faxes are received "primarily by businesses." Pet. 10-11. Many fax machines, however, are owned by individuals in their homes or small businesses. See *Minnesota* v. *Sunbelt Communications & Mktg.*, 282 F. Supp. 2d 976, 978-979 (D. Minn. 2002) (describing affidavits of one individual who "received so many advertisements on her home fax machine that they used all of the toner and caused her to miss faxes that she expected and wanted to receive," a second individual who "received approximately five advertisement bundles from [a single source] each week" on the fax machine in his home office, and a third individual who "received fax advertisements between 4:15 a.m. and 7:15 a.m." at the fax machine in her home); *In re Fax.com, Inc.*, 17 F.C.C.R. at 15,931-15,932 (allegation that "several consumers" were "awakened very late at night or in the early hours of the morning" by petitioner's transmission of unsolicited fax advertising). Moreover, as the evidence in the record of this case demonstrates, unsolicited fax advertising causes unique disruptions for businesses, such as interference with their switchboard and electronic mail systems. See Pet. App. 8a; see also *Sunbelt*, 282 F. Supp. 2d 978; *In re Fax.com, Inc.*, 17 F.C.C.R. at 15,932-15,933 (allegation that petitioner's transmission of fax advertising tied up a physician's fax line reserved for receiving patient medical data).

The scope of Section 227(b)(1)(C) conforms closely to the problem at which it was directed. That provision does not ban fax advertisements. It simply requires advertisers to obtain the recipient's consent before using his fax machine, paper, and other supplies to print their advertisements. Advertisers can use various simple and inexpensive means, such as bulk mailings, to determine which businesses or individuals wish to receive their fax transmissions.

Petitioner is incorrect in asserting that Section 227(b)(1)(C) is not sufficiently narrowly tailored, because Congress might have advanced its interest by placing the burden on fax machine owners affirmatively to indicate that they do not want to receive fax advertising. See Pet. 12-16. As this Court has recognized, "[t]he Government is not required to employ the least restrictive means conceivable" in regulating commercial speech, for the First Amendment requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Greater New Orleans*, 527 U.S. at 188 (quoting *Fox*, 492 U.S. at 480).

Congress's choice to impose the burden of avoiding unwanted fax advertising on advertisers was especially reasonable, given the record before Congress that virtually *no* recipients want their fax machines used to receive and print unsolicited advertising. For example, Congress was informed that "business owners are virtually unanimous in their view that they do not want their fax lines tied up by advertisers trying to send messages," and that "[e]xtensive research has revealed no case of a company (other than those advertising via fax) which opposes legislation restricting advertising via fax." *1989 House Hearing* 54-55 & n.35 (statement

of Professor Robert L. Ellis, Indiana University Law School). Members of Congress were thus entitled to conclude that Section 227(b)(1)(C)'s requirement that advertisers obtain the consent of the recipient before transmitting a fax advertisement was "the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine." S. Rep. No. 178, *supra*, at 8.

Nothing in *Thompson* v. *Western State Medical Center*, 535 U.S. 357 (2002), suggests that Section 227(b)(1)(C) is not sufficiently narrowly tailored to satisfy the First Amendment. *Thompson* involved a prohibition on the advertising of compounded drugs that had not been approved by the Food and Drug Administration (FDA), which the government defended as an accommodation of its interests in preserving both the integrity of the FDA's approval process for drugs marketed broadly and the availability of compounded drugs for individual patients. See 535 U.S. at 368. The Court concluded that the advertising prohibition did not satisfy the *Central Hudson* standard, explaining that "[s]everal non-speech-related means of drawing a line between compounding and large-scale manufacturing might be possible," and that "[t]he Government has not offered any reason why these possibilities, alone or in combination, would be insufficient." *Id.* at 372, 373. Here, however, there is no "non-speech-related means" of advancing the government's interest in preventing the cost-shifting and interference with fax machine use caused by unsolicited fax advertising. The most effective means of doing so is by barring transmissions of unsolicited fax advertising. Whether the bar applies automatically, as under Section 227(b)(1)(C), or only in response to a recipient's registered objection to such transmissions, is not a difference of consti-

tutional dimensions. See *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 217-218 (1997) (a law does not fail intermediate scrutiny merely "because some alternative solution is marginally less intrusive on a speaker's First Amendment interests").

II. THE TCPA'S PROHIBITION OF UNSOLICITED FAX ADVERTISING HAS BEEN UNIFORMLY UPHELD BY FEDERAL AND STATE APPELLATE COURTS AGAINST FIRST AMENDMENT CHALLENGES

Although petitioner urges the Court to grant review in this case to resolve asserted "confusion among the lower courts" in the analysis of commercial speech regulations (Pet. 6), there is no confusion about the constitutionality of the TCPA's fax advertising regulation. In the more than a decade since the TCPA was enacted, no appellate court, state or federal, has held that Section 227(b)(1)(C) violates the First Amendment.

The Ninth Circuit, like the Eighth Circuit here, has upheld Section 227(b)(1)(C) under the First Amendment as a permissible regulation of commercial speech. See *Destination Ventures*, 46 F.3d at 56-57. A number of federal district courts have also rejected First Amendment challenges to Section 227(b)(1)(C). See *Minnesota* v. *Sunbelt Communications & Mktg.*, 282 F. Supp. 2d 976, 981-984 (D. Minn. 2002); *Texas* v. *American Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1091-1092 (W.D. Tex. 2000); *Kenro, Inc.* v. *Fax Daily, Inc.*, 962 F. Supp. 1162, 1167-1169 (S.D. Ind. 1997); 5/23/03 Report and Recommendation, *Texas* v. *Fax.com, Inc.*, No. A-02-CA-080 JN (W.D. Tex. approved June 18, 2003).

Because TCPA cases in which a private party is the plaintiff are generally heard in state court, see 47

U.S.C. 227(b)(3), several state courts have had occasion to consider the constitutionality of Section 227(b)(1)(C). The two state appellate courts that have addressed the question have sustained Section 227(b)(1)(C) under the First Amendment. See *Harjoe* v. *Herz Fin.*, 108 S.W.3d 653 (Mo. 2003); *Kaufman*, 2 Cal. Rptr. 3d at 312-324. State trial courts generally have done so as well. See, *e.g.*, *Covington & Burling* v. *International Mktg. & Research, Inc.*, Civ. No. A. 01-0004360, 2003 WL 21384825 (D.C. Super. Ct. Apr. 17, 2003), amended on reconsideration, 2003 WL 21388272 (D.C. Super. Ct. May 14, 2003); *Whiting Corp.* v. *MSI Mktg., Inc.*, No. 02 CH 6332 (Ill. Cir. Ct. Apr. 3, 2003), slip op. 2-8; *Mark Chair Co.* v. *Mortgage Managers, Inc.*, No. 02 LK 247 (Ill. Cir. Ct. Dec. 20, 2002); *Levitt* v. *Fax.com, Inc.*, No. 24-C-01-2218 (Md. Cir. Ct. Nov. 27, 2002), slip op. 7-10; *Robin Hill Dev. Co.* v. *JD&T Enters.*, No. 01 L 527 (Ill. Cir. Ct. Oct. 3, 2002). Only two New York trial court decisions, following the reversed district court decisions in this case, have held that Section 227(b)(1)(C) violates the First Amendment, and those cases are on appeal. See *Rudgayzer & Gratt* v. *Enine, Inc.*, 749 N.Y.S.2d 855 (Civ. Ct. 2002); *Bonime* v. *Perry Johnson, Inc.*, No. 61977 KCV (Civ. Ct. Nov. 8, 2002).

Accordingly, whatever need there might be for this Court's guidance about the constitutionality of other statutes, no such need exists with respect to the TCPA's restriction on fax advertising. Indeed, even outside the context of Section 227(b)(1)(C), petitioner does not identify any decisional conflict that would warrant certiorari. Although petitioner claims a conflict between the court of appeals' decision in this case and decisions striking down "laws that target commercial speech for reasons unrelated to its commercial content," petitioner relies solely on three district court

decisions that were not appealed or were overturned on appeal and a fourth in which an appeal is pending. Pet. 20; see Pet. 22; see also *FTC* v. *Mainstream Mktg. Servs., Inc.*, 345 F.3d 850 (10th Cir. 2003) (granting stay pending appeal in First Amendment challenge to federal telemarketing regulations on ground, *inter alia*, that the government is likely to prevail on the merits). Petitioner's other claimed "conflicts" reflect, at most, mild tension between lower courts' slightly differing analytic approaches. Moreover, those decisions arise under wholly different regulatory schemes (often schemes directed at the content of a message rather than the mode of its dissemination), and thus do not suggest that any court would have viewed Section 227(b)(1)(C) any differently from the Eighth Circuit here.

Acknowledging the absence of any square circuit conflict on the validity of Section 227(b)(1)(C), petitioner urges that the Court nonetheless should grant review, because the economic pressures on defendants to settle cases such as this one could prevent a conflict from arising. See Pet. 26-30. If fax advertisers face significant liability, however, one would expect them to mount vigorous defenses, including challenges to the constitutionality of Section 227(b)(1)(C). Such challenges may be able to be mounted without the risk of incurring significant damages. If advertisers elect to settle claims against them, it is presumably because they share the overwhelming view of the courts that Section 227(b)(1)(C) passes constitutional muster. To the extent that large damages awards raise other constitutional concerns, those concerns are not implicated here, where the district court invalidated Section 227(b)(1)(C) on its face.

III. THIS IS NOT A SUITABLE VEHICLE TO CONSIDER ANY MODIFICATION OF THIS COURT'S ANALYSIS OF COMMERCIAL SPEECH REGULATIONS

Finally, although petitioner urges the Court to grant review in order to consider whether the *Central Hudson* standard should continue to apply to commercial speech regulations (Pet. 22-26), this would not be a suitable vehicle in which to consider that question. In the first place, the court of appeals did not analyze whether the *Central Hudson* standard should be modified or supplanted, observing simply that "the Supreme Court has recently indicated that *Central Hudson* remains the test for the constitutionality of a restriction on commercial speech." Pet. App. 6a. Nor did petitioner preserve the question in the courts below.

As petitioner notes, several members of the Court have suggested that a standard stricter than *Central Hudson*'s should apply to certain varieties of commercial speech regulations. See *Thompson*, 535 U.S. at 367-368. Those suggestions have generally been offered, however, in connection with regulations designed to suppress speech because of its content for reasons described as paternalistic. For example, Justice Thomas has maintained that "the *Central Hudson* test should not be applied" in cases "in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *Greater New Orleans*, 527 U.S. at 197 (Thomas, J., concurring in judgment)) (quoting *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment). Similarly, Justice Stevens, joined by Justices Kennedy and Ginsburg, has urged that strict scrutiny should apply to "complete

bans on truthful, nonmisleading commercial speech" that "rest solely on the offensive assumption that the public will respond 'irrationally' to the truth." 44 *Liquormart*, 517 U.S. at 502, 503 (opinion of Stevens, J.) (quoting *Linmark Assocs., Inc.* v. *Willingboro*, 431 U.S. 85, 96 (1977)).

Section 227(b)(1)(C) is not the sort of regulation to which *any* Member of the Court has urged the application of strict scrutiny. That provision is not a "complete ban" on the advertising of any product or service, much less one designed to keep consumers "ignorant" of information that the government thinks would harm them. It allows advertisers to disseminate any commercial message without regard to its content. It merely prohibits advertisers from appropriating a recipient's fax machine, paper, and other supplies, without his consent, in order to disseminate the message. Regulations of that sort pose no impediment to the freedom of speech protected by the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(5)

No. 03-507

IN THE

Supreme Court of the United States

FAX.COM, INC.,

Petitioner,

v.

STATE OF MISSOURI EX REL. NIXON,
ATTORNEY GENERAL, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15(8), Petitioner Fax.com submits this supplemental brief to call to the Court's attention an Order of the Federal Communications Commission ("FCC") issued after Petitioner's last filing. *See In re matter of Fax.com, Inc.*, Order of Forfeiture, adopted December 31, 2003, and released January 5, 2004 (published at http://hraunfoss.fcc.gov/edocs_public/attach-match/FCC-04-2A1.doc) (the "Order"). The Order determined that Fax.com violated section 227(b)(1)(C) of the Telephone Consumer Protection Act (the "TCPA") "by sending unsolicited advertisements to telephone facsimile machines on behalf of its clients on 489 separate occasions." Order at ¶ 1. As a result of these 489 single page faxes, the FCC assessed the "statutory maximum" forfeiture of $11,000 per fax for a total forfeiture award of $5,379,000 against the Petitioner. *Id.* at ¶ 7. It is significant that the faxes subject to the forfeiture Order all predate the decision of the Eighth Circuit which overturned the trial court's determination that the TCPA's ban of unsolicited fax advertising violates the First Amendment. *Id.* at fn.18 ("The transmissions were received from September 2001 until June 2002").

It is more significant, however, that the Order highlights the onerous burden that the TCPA places on commercial speakers. By ordering a forfeiture of $11,000 per fax, threatening more than one hundred clients of Fax.com with monetary forfeitures, and wholly ignoring those recipients who wish to receive unsolicited faxes, the Order stifles an entire medium for commercial speech under all but the most procrustean of circumstances. *Id.* at ¶¶ 8, 26. Specifically, the FCC's Order confirms and emphasizes that the TCPA enacts a "blanket prohibition" on facsimile advertising (Order at fn. 10), rather than adopting a more narrowly tailored approach such as requiring advertising

faxes to include an opt-out number (which the faxes at issue did, *see id.* at ¶21) or implementing a do-not-fax list like the do-not-call list. Moreover, the Order makes clear that the Act's "blanket prohibition" does not recognize permission to transmit faxes through an established business relationship and that it demands prior written consent to send any commercial fax:

> The Commission originally determined that an established business relationship between a fax sender and recipient demonstrates consent to receive facsimile advertisements. Recently, however, the Commission concluded that an established business relationship does not constitute prior express invitation or permission to send fax advertisements, and that a consumer's invitation or permission must be recorded in a signed, written statement that contains the telephone number where faxes may be delivered and that clearly evinces the consumer's agreement to receive fax advertising from the sender.

Order at fn. 10 (citing 2003 TCPA Report and Order, 18 FCC Rcd at 14,014). Thus, a business will not be able to send faxes even to longtime customers or clients without first having obtained specific permission in writing. This "blanket prohibition" of unsolicited faxes constricts the rights of commercial speakers, ignores the realities of modern communication methods, and confirms the need for this Court's immediate intervention.

CONCLUSION

The petition for writ of certiorari should be granted.

January 2004

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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INTEREST OF AMICI CURIAE[1]

Resource Bank, Drury Inns, Inc., and Perry Johnson, Inc. (collectively referred to as "Amici") respectfully submit this brief in support of Petitioner. Counsel for each party has consented to the filing of this brief.

Although Amici are three diverse businesses—a Virginia bank, a Midwest-based hotel chain, and a worldwide training and consulting organization—all of them utilize the fax machine to communicate time-sensitive information regarding their products and services to consumers. Consequently, each also bears the title of defendant in class action lawsuits pending throughout the United States alleging violations of the Telephone Consumer Protection Act (the "TCPA") and seeking millions of dollars in statutory damages. As such, Amici have a direct, profound, and continuing interest in this case.

1. Resource Bank.

Resource Bank ("Resource") is a Virginia chartered regional commercial bank, headquartered in Virginia Beach. Established in 1988, Resource has branches in Virginia Beach, Chesapeake, Newport News, Richmond and Herndon, Virginia. It also has mortgage offices in the States of Maryland, North Carolina and Florida. Resource is a wholly owned subsidiary of Resource Bancshares Corporation.

Resource offers its customers traditional banking services including deposit accounts, consumer loans and commercial loans. Resource also offers its banking services through its online "eBranch." Resource and daily mortgage bankers necessarily rely heavily on the use of faxing as a means of communicating time-sensitive information, such as

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[1] Pursuant to Supreme Court Rule 37.6, amici state that this brief was authored in part by Greensfelder, Hemker & Gale, P.C., co-counsel for Petitioner Fax.com. Greensfelder, Hemker & Gale, P.C. also serves as counsel for amici Resource Bank and Drury Inns, Inc. in class-action lawsuits pending in Indiana and Missouri, respectively. No person or entity, other than amici, made a monetary contribution to the preparation or submission of this brief.

the best mortgage products that are tied to hourly fluctuating wholesale interest rates, to existing and potential customers.

Resource is a defendant in a putative class action lawsuit pending in the Circuit Court of Marion County, Indiana. The named plaintiff and putative class representative is a law firm that allegedly received a one-page fax pertaining to home mortgage products from Resource. Plaintiff in that action seeks to certify a nationwide class and recover millions of dollars in statutory damages from this FDIC insured bank.

2. Drury Inns, Inc.

Drury Inns, Inc. ("Drury") is a family owned and operated chain of hotels located in 17 states in the Midwest and Southeast United States. The brands operated by Drury include Drury Inn, Drury Inn and Suites, Drury Suites and Pear Tree Inn.

In the aftermath of September 11th, and with no knowledge of the TCPA, Drury engaged in a single fax campaign offering incentives for "last-minute" reservations in an attempt to fill vacancies. Drury now finds itself a defendant in a class action lawsuit pending in the Circuit Court of St. Louis County, Missouri, in which two named plaintiffs on behalf of a putative class seek thirty million dollars in statutory damages.

3. Perry Johnson, Inc.

Perry Johnson, Inc. ("PJI") is a Michigan-based company that specializes in training and consulting with other businesses regarding compliance with quality system management standards requirements established by the International Organization for Standardization ("ISO") and other standardization organizations. PJI communicates by fax with its clients and potential clients regarding, among other things, ISO upgrades and changes that affect the private and public sectors.

PJI went to great lengths and considerable expense to comply with state laws regulating fax advertising. Despite its efforts, PJI is the defendant in a class action lawsuit pending

in the Superior Court of San Mateo, California, in which a class already has been certified. While PJI would like to fax information to its clients regarding ISO upgrades and changes and its training and consulting services, it has stopped all faxing activity for fear of violating the TCPA.

SUMMARY OF ARGUMENT

Amici present this brief to underscore that fax advertising is not, as many lower courts have mistakenly assumed in perfunctorily rejecting First Amendment attacks on the TCPA, the exclusive province of so-called "junk" advertisers. Rather, fax advertising is a critically important tool of commercial communication relied on extensively and effectively by a host of mainstream businesses, such as Amici. It is essential for the efficient operation of certain businesses and industries, such as mortgage bankers and the travel industry, which need to communicate time-sensitive information to the public, or to target a specific demographic, or both. Each of these businesses has a constitutional right to communicate this commercial information to their existing and potential customers.

Nor can it be assumed, again as many lower courts have wrongly done, that unsolicited fax advertisements bother every recipient. In fact, many recipients respond favorably to unsolicited fax advertising. Many rely on such valuable, time-sensitive information to keep pace in the information age and make informed commercial decisions in constantly fluctuating markets. Without a receptive audience, fax advertising would have died a natural death long ago. No business would continue to advertise by fax if it did not receive positive consumer feedback in the form of increased sales. These fax recipients also enjoy a constitutional right to receive such commercial information.

Both the TCPA and the Eighth Circuit's flawed decision below ignore these constitutional rights of businesses such as Amici, and their customers and potential customers who welcome and even rely on unsolicited faxes containing

valuable, time-sensitive commercial information. Instead, Congress and the Eighth Circuit impermissibly exalted the rights of objecting recipients—rights which are not enshrined in the constitution—over these constitutional rights.

In so doing, neither Congress nor the Eighth Circuit meaningfully considered alternative, more narrowly tailored methods of regulation that would protect the interests of both fax advertisers and non-objecting recipients, on the one hand, and objecting recipients, on the other hand, and place the choice where this Court has held it belongs–with the consumer. Congress instead unconstitutionally substituted its judgment for that of businesses and consumers regarding the value of commercial advertisements. Adding insult to constitutional injury, Congress proceeded to subject unwary firms such as Amici to strict liability and huge damages whether or not they even knew about the TCPA's fax ban, simply because they communicated truthful, valuable commercial information via fax.

The TCPA's constitutional infirmity is further demonstrated by the Act's irrational prohibition on sending an unsolicited fax advertisement to a recipient that has not provided "express invitation or permission," without carving out an exception for an existing business relationship. Thus, *any* attempt by companies such as Amici to advertise via fax is accompanied by the substantial risk of potentially devastating liability.

Congress, with the Eighth Circuit's blessing, irrationally and arbitrarily singled out truthful commercial speech and subjected it to punitive regulation. The purported justification for the TCPA was to prevent shifting pennies in paper and toner costs from the advertiser to, and interfering with the use of a fax machine by, objecting recipients. Yet the Act's myopic ban on commercial ads alone bears no relationship whatsoever to these putative interests, for both commercial and non-commercial faxes cause these "harms."

In straining to overturn the District Court's decision and uphold the TCPA, the Eighth Circuit disregarded or distorted

this Court's more recent decisions applying the *Central Hudson* test. Should the Court allow that fatally flawed decision to stand, it is questionable whether any of the Amici will retain the financial wherewithal to raise these issues with the Court once a final judgment is rendered in their cases. Amici are not alone. Business of all types—not just FDIC insured banks, consulting firms, and hotel chains—face devastating financial consequences, including bankruptcy, as a result of the TCPA. The TCPA's draconian liability and damages scheme may thus ironically insulate its unconstitutional restrictions on commercial speech from ultimate review here. Amici present this brief now to bring to the Court's attention the presumably unintended consequences for mainstream businesses of a constitutionally-flawed statute.

REASONS FOR GRANTING CERTIORARI

I. The TCPA's Prohibition On Facsimile Advertising Unconstitutionally Eliminates A Uniquely Efficient and Affordable Method Of Marketing.

According to the Relocation Information Service, Inc., the mortgage industry accounts for nearly 25 percent of the fax broadcasting market, with other financial services comprising 11 percent. *NAR Secures Stay to Clarify Do-Not-Fax Rule* (http://sss.rismedia.com/index.php/article/articlestatic/4681/1/1/) (Oct. 23, 2003). The products offered by banks, especially investment products and loans, are tied to government interest rates that react to changing political and economic conditions, and thus fluctuate on a daily and sometimes hourly basis. These ever-changing variables require banks to communicate with customers and potential customers at a moment's notice. Thus, banks frequently communicate with mortgage brokers, correspondents, automobile dealerships and others via fax to promote products and advertise available interest rates. Many of these lenders rely heavily on "rate sheets" that are faxed one or

more times per day. An interest rate based product that is available now may be gone in a day or even an hour.

Similarly, the travel industry must have a means of immediately communicating vacancies on cruise ships, in hotels, or on airplanes. Travel businesses have regularly used the fax machine to communicate short-term promotions and special rates to travel agents and other interested parties. Fax advertising generates millions for the travel industry each year, provides outstanding savings to consumers, and has helped stabilize an industry still reeling in the wake of September 11th.

The ability to communicate the availability of goods or services to a mass audience is especially important today when information is communicated globally in seconds, and the maintenance of open lines for the dissemination of commercial information is more important than ever. One of the most efficient and effective methods of prompt communication available is the fax machine. Faxing is virtually the only medium that makes wide dissemination of time-sensitive information possible on an immediate and targeted basis. It also allows consumers to compare readily the products offered by competing firms. An individual can receive a fax advertisement without having to speak with a salesperson. In most cases, a fax recipient need not be logged in at a computer. Faxing accomplishes all of these things with unique affordability, and is thus particularly attractive to small businesses that cannot afford to advertise though expensive and often ill-suited print or broadcast media.

The TCPA severely handicaps businesses and industries by depriving them of this invaluable and uniquely immediate medium of communication. The TCPA's effective ban of advertising by fax the "commercial availability or quality of any property, goods, or services" prevents firms like Amici from sharing valuable information with consumers who want it. This prohibition, when combined with the ever expanding restrictions on phone solicitations and the movement toward broadly circumscribing all electronic solicitations, including

e-mail, makes it impossible for certain companies, including scores of small businesses, to advertise time-sensitive products in the small window of opportunity existing at any given time.

This ban will reduce many companies to passive marketing, in which the consumer initiates contact with firms they already know. Smaller businesses will suffer because they cannot afford to advertise by expensive broadcast media, publication or direct mail as effectively and as frequently as larger firms. Willing recipients will pay more or get less without information about more competitive pricing and products. Many markets and industries thus will operate less efficiently.

These TCPA-driven phenomena are anathema to this Court's landmark commercial speech decision in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Recognizing that the public has a constitutional right in the free flow of commercial information, the Court extended First Amendment protection to commercial speech to ensure that consumers have the information they need to buy safe products at competitive prices. Four years later, the Court adopted the four-part *Central Hudson* test to determine whether restrictions on commercial speech violate the First Amendment. *Central Hudson*, 447 U.S. at 564.

Applying this test, the United States District Court for the Eastern District of Missouri held that the TCPA's prohibition on faxing was unconstitutional. The District Court reasoned that the government had not established a substantial interest for the fax ban. The court also found that the TCPA's no-fax provisions are neither narrowly tailored, nor a direct fit to serve the interests asserted by Congress. Pet. App. 37a-41a.

In reversing the District Court's judgment, the Eighth Circuit failed to consider the cases succeeding *Central Hudson* that demonstrate the ever-increasing rigor with which this Court scrutinizes commercial speech restrictions. Instead, the Eighth Circuit performed a perfunctory, results-

oriented analysis that distorted the holdings of this Court and relied on lower court decisions that likewise failed to apply the *Central Hudson* test properly. Through this faulty analysis, the appellate court sanctioned the TCPA's effective elimination of an entire medium of advertising.

In this way, both the TCPA and the Eighth Circuit's decision conflict with this Court's recent decision in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). There, the Court held that state regulations banning certain outdoor ads for tobacco products, which effectively prohibited all outdoor ads in certain urban areas, violated the First Amendment. *Id.* at 562. Despite the state's "compelling" and "substantial" interest in preventing underage tobacco use, the interests of the tobacco retailers and manufacturers "in conveying truthful information about their products to adults, and ... corresponding interest [of adults] in receiving truthful information about tobacco products" were protected under the First Amendment. *Id.* at 564. The Court held that the paternalistic regulation was unconstitutional because the legislature "cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.* at 566.

The paternalistic justification for the TCPA's burden on speech is ostensibly to prevent the use of the objecting recipient's paper, toner and fax lines. By contrast, the Court observed in *Lorillard* that prohibiting billboards near schools and playgrounds was unconstitutional, despite the fact that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." 533 U.S. at 570 (internal citation omitted). If prohibiting billboard advertising could not be justified by preventing the most significant health risk in the country, it is inconceivable that a blanket ban on fax advertising could be justified by preventing advertisers from shifting the pennies in cost of paper and toner, or occupying fax machines.

The *Lorillard* Court also acknowledged that certain businesses or industries have a free speech interest in the ability to propose an immediate transaction. *Id.* at 565. "[A] retailer ... may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement ... do not allow the retailer to propose an instant transaction." *Id.* Again, each Amici needs to immediately notify customers of time-sensitive products or services. Under the TCPA, however, a wide array of firms such as Amici are prohibited from using the most rapid and efficient delivery process to do so. Any effort to that end will subject the sender to private causes of action, enforcement by the attorney general, FCC fines and class action lawsuits that literally can break the bank.

The TCPA's heaviest burden is imposed on smaller businesses that cannot afford print, radio and television advertising. As the Court noted in *Lorillard,* "[i]f some retailers have relatively small advertising budgets, and use few avenues of communication, then the ... regulations potentially place a greater, not lesser, burden on those retailers' speech." 533 U.S. at 564-65. Even for those who can afford it, traditional media often are inadequate because they cannot accommodate either the rapid changes in information, such as interest or hotel rates, or the need to target nationwide or specific audiences. As in *Lorillard*, Congress's failure to consider these effects renders the TCPA unconstitutional.

The Eighth Circuit found that the TCPA did not eliminate an entire medium because it merely requires the sender to first obtain the recipient's permission. Pet. App. 15a. The court found that "[a]dvertisers may obtain consent for their faxes through such means as telephone solicitation, direct mailing, and interaction with customers in their shop." *Id.* For all practical purposes, the TCPA's express prior consent requirement legislates fax advertising out of existence. It would destroy the benefit of timely dissemination of valuable commercial information such as notices about daily

fluctuations in interest rates. It also would impose substantial costs that would destroy fax advertising's other main attraction: it is inexpensive and thus available to small businesses that cannot afford television, newspaper and radio advertising. To claim as the Eighth Circuit does that prior consent can be obtained from customers already in the shop is to ignore the primary goal of advertising—to attract ***new*** business. As the District Court noted, "there is no practical way for companies to gain permission ...." Pet. App. 41a n. 26. In any event, "[o]ne need not, as a condition precedent to his right of free speech under the First Amendment, secure the permission of his auditor." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 79-80 (1983). The TCPA is unconstitutional because it eliminates a unique and essential medium of advertising.

II. The TCPA and the Eighth Circuit Ignore The Constitutional Rights of Willing Fax Recipients.

The Court has recognized time and again that the public has a constitutional right in the free flow of commercial information. In *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court recognized the "societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Id.* at 766. *Cf. Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (freedom of speech "embraces the right to distribute literature and necessarily protects the right to receive it").

As a general rule, the speaker and the audience, not the government, assess the value of information. *Edenfield*, 507 U.S. at 767. The purpose and effect of the TCPA, however, is to cut off all fax advertising of commercial goods and services absent the prior express permission or invitation. By failing to apply *Central Hudson* properly and require Congress to use more narrowly tailored alternatives (such as including fax numbers in the existing Do-Not-Call list), the Eighth Circuit allowed the TCPA to suppress commercial

speech that many recipients find beneficial and have a constitutional right to receive.

The Eighth Circuit gave short shrift to the constitutional right of willing recipients of truthful, unsolicited commercial faxes to receive that information:

> While it is true that the effect of the TCPA will be that some consumers will not receive unsolicited advertisements they might have appreciated, under the approach advocated by [defendant] there would always be individuals suffering costs and interference from unwanted advertisements. It was not unreasonable for Congress to choose a system that protects those who would otherwise be forced to bear unwanted burdens over those who wish to send and receive unsolicited fax advertising.

Pet. App. 15a.

Congress's choice was unreasonable, however, because it ignores the constitutional rights of fax machine owners who welcome fax advertising and enjoy a First Amendment right to receive such information. Congress' choice also was unreasonable because it does not allow fax machine owners to decide for themselves whether they want to receive unsolicited commercial faxes. As the Court noted in *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994), "[i]f the government wants to protect householders from unwanted solicitors, it may enforce 'No Soliciting' signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say." *Id. at* 682-83 (citing *Martin*, 319 U.S. at 143).

The Eighth Circuit, however, myopically focused on the so-called "right" of those who do not want to receive such faxes. Such an approach deprives willing recipients of their constitutional rights simply because acutely sensitive fax recipients (or, more likely, those seeking a windfall under the TCPA's damages scheme)—who the District Court found to comprise a wholly undefined percentage of the total universe of fax recipients—cannot be bothered to make a simple toll-

free telephone call or click their computer mouse to notify a fax advertiser or Do Not Fax registry that they object to receiving unsolicited commercial faxes.

The Eighth Circuit's myopia cannot be reconciled with this Court's decision in *Greater New Orleans Broad. Assoc. v. United States*, 527 U.S. 173 (1999) in which the Court gave substantial credit to the interest of the audience. *Id.* at 184-85. ("Thus, even if the broadcasters' interest in conveying these messages is entirely pecuniary, the interests of, and benefit to, the audience may be broader.")

This reasoning applies with equal force to the TCPA. Many businesses and consumers have a substantial interest in the continued receipt of faxes advertising the availability of commercial goods and services. Mortgage brokers, automobile dealerships and other businesses have an interest in the continued receipt of rate sheets from lending institutions such as Resource. Frequent travelers and travel agents likewise have an interest in the continued receipt of special rates from hotels and airlines, such as Drury. The interests of the audience in "inform[ed] consumption choices" and "price competition" are significant interests and are necessary elements for the efficient operation of a free market economy. Those interests are entitled to First Amendment protection. The TCPA and the Eighth Circuit completely disregard those interests in favor of a paternalistic statutory scheme that substitutes the judgment of Congress for that of consumers. Suppressing commercial speech from those who wish to continue receiving it is clearly unconstitutional.

The Eighth Circuit's failure to consider the constitutional rights of non-objecting recipients who welcome and rely on facsimile advertisements sets a dangerous precedent that cannot be allowed to stand.

III. The TCPA Arbitrarily Discriminates Against Commercial Speech.

Several cases succeeding *Central Hudson* have recognized that the legislature may not place arbitrary and irrational restrictions on commercial advertising without running afoul of the First Amendment. In *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), for example, the Court struck down a city ordinance that allowed only non-commercial publications to be distributed through freestanding newsracks located on public property. In defending this ordinance, the city argued that commercial newsracks were an eyesore. The Court rejected this argument, reasoning that, because both commercial and non-commercial newsracks were equally unappealing, the ordinance's distinction between commercial and noncommercial speech bore "no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424. The Court thus held that the ordinance was unconstitutional.

Six years later, in *Greater New Orleans Broad. Assoc.*, *supra*, the Court faced the question of whether a federal statute could prohibit advertisements for private casino gambling in states where such gambling was legal. In holding that the ban violated the First Amendment, the Court rejected the Government's argument that Indian casinos, which the statute exempted, were too isolated to warrant attention, and held that the distinction between private and tribal casinos was insufficient to abridge the freedom of speech of one class more than the other. 527 U.S. at 192-3. The Court held that a regulation may not "distinguish among the indistinct" by allowing a variety of speech that entails the same harm as that which has been proscribed. *Id.* at 195.

The TCPA likewise impermissibly purports to distinguish among the indistinct. Congress' singling out of commercial speech for suppression bears no relationship to the particular interests asserted by Congress—to prevent advertisers from using recipients' fax machines, paper and toner. The Eighth Circuit, in fact, did not dispute that each non-commercial fax

imposes the same costs upon its recipient as commercial faxes. Under *Discovery Network* and *Greater New Orleans*, then, the TCPA is unconstitutional.

The Eighth Circuit tries to justify the disparate treatment of commercial and non-commercial faxes by suggesting that non-commercial solicitations were expected and therefore acceptable. Pet. App. 10a. This distinction, however, is clearly insufficient under *Central Hudson*. By adopting Congress' bald conclusion that noncommercial solicitations would be "wanted" or "expected" more than commercial advertisements, without reference to any evidence, the Eighth Circuit ignored the presumption that "the speaker and the audience, not the Government, should be left to assess the value of truthful information about lawful conduct." *Greater New Orleans*, 527 U.S. at 195.

The TCPA arbitrarily and irrationally discriminates against commercial speech and should be struck down.

IV. The Eighth Circuit Misconstrued This Court's Precedents in Attempting to Distinguish *Thompson's* "least restrictive means" Test.

In *Thompson v. Western States Med. Ctr.*, the Court stated that in "addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government *must* do so." 535 U.S. 357, 371 (2002) (emphasis added). The Eighth Circuit relies on *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (2002), for its proposition that *Thompson*'s "least restrictive means" test is inapplicable to the TCPA. Citing that decision, the Eighth Circuit essentially finds that the TCPA is constitutional because it regulates a "harmful delivery practice" or the "secondary effects," not the content, of the prohibited speech. The Eighth Circuit's heavy reliance on *Florida Bar* is simply misplaced.

In *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), the Court upheld a regulation that applied only to a particular

category of speech; *i.e.*, adult films, because it was only that type of speech, and not the exempted speech; *i.e.*, non-adult films, that engendered the secondary effects the regulation was designed to ameliorate; *i.e.*, crime and residential blight. *Id.* U.S. at 47. In *Boos v. Barry*, 485 U.S. 312 (1987), the Court again limited this doctrine to instances when "regulations ... apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech" and not the exempted type of speech. *Id.* U.S. at 320. Stated differently, the doctrine applies only when the secondary effects are "unique" to a particular type of speech. *Id.*

Accordingly, in *Discovery Network* the Court rejected an argument essentially identical to the Eighth Circuit's analysis because "[i]n contrast to the speech at issue in *Renton*, there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on the sidewalks." 507 U.S. at 430. Similarly, there are no secondary effects attributable to unsolicited commercial fax advertisements that distinguish them from the unsolicited non-commercial fax advertisements that the TCPA permits. Both involve the very same cost shifting and interference. Because the purported effects or harms of the "act" of unsolicited faxing targeted by the TCPA are equally associated with non-commercial faxes, the Eighth Circuit's "harmful delivery practice" analysis is mistaken. *See Discovery Network*, 507 U.S. at 430.

Moreover, in relying on *Florida Bar* to dilute the "reasonable fit" test, the Eighth Circuit loosed that decision from its intellectual and factual moorings. The speech restriction in Florida *Bar* imposed a thirty-day restriction on targeted direct-mail solicitation of accident victims and their relatives by attorneys. 515 U.S. at 620. The purpose of the restriction was "to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered." *Id.* at 637. *Florida Bar* was a case of the government "acting on

behalf of entities it regulates" to enact a "short temporal ban." *Id.* at 632-633. Had the case "dealt with a broad ban of all direct-mail solicitation, whatever the time frame and whoever the recipient," the speech restriction would not have passed constitutional muster. *Id.* at 553 (citing *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988)).

In this case, the TCPA contains no limit on either the "time frame" or the "recipient." *See Florida Bar* at 632-633. Under the TCPA, there is no safe period of time to send a fax and no presumptively safe recipient—all unsolicited commercial faxes are barred regardless of when they are sent or who receives them. A faxed letter from an attorney to an existing client suggesting that it might be time to update a will or review a business practice could even be swept within the Act's purview. *See Shapero*, 486 U.S. at 472 ("Lawyer advertising is in the category of constitutionally protected commercial speech.") (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 366 (1977)). In sharp contrast, *Florida Bar*, which limited direct mail solicitations to recent accident victims for thirty days, did not even remotely approach the TCPA's sweeping ban on fax advertising. *Thompson* thus applies to the TCPA.

Under *Thompson*, a number of less restrictive alternatives to the TCPA's outright ban on unsolicited fax advertising causes the Act to fail *Central Hudson's* fourth prong, because "the Government could achieve its interests in a manner that does not restrict speech, ***or that restricts less speech***." *Thompson*, 122 S. Ct. at 1506 (emphasis added). Apart from the less restrictive alternatives used by a number of states (e.g., restricting such faxes to certain times of day, requiring the sender to maintain a toll-free number that objecting recipients may call to have their fax number removed from the sender's database), the FTC's Do Not Call registry is the most obvious less restrictive alternative. Fax numbers are merely telephone numbers, such that the registry can easily be adapted so consumers can enter their fax numbers into the registry and enjoy its protections. A consumer would be able

to do this even ***before*** receiving a single unsolicited fax. Including fax numbers on the national Do Not Call registry would ensure that the costs of that regulatory scheme would not be funded by taxpayer dollars; instead, it would be paid for by the advertisers themselves. If a fax advertiser called a number listed in the registry; *i.e.*, solicited an already objecting fax machine owner who had posted the technological equivalent of a "No Soliciting" sign, liability would at that point rightly attach. Consequently, the national Do Not Call registry provides a more narrowly tailored means to balance the First Amendment rights of fax advertisers and consumers who welcome such commercial speech, on the one hand, and the rights of objecting recipients, on the other, than does the TCPA's overly broad solution of an outright ban.

The Eighth Circuit, however, dismissed in a mere footnote the more narrowly tailored means of a "Do Not Fax" registry, without any discussion whatsoever as to why such a clearly viable alternative did not render the TCPA unconstitutional. Like Congress, the Eighth Circuit impermissibly failed to "offer[] any reason why these possibilities, alone or in combination, would be insufficient[,]" such that an outright ban "was a necessary as opposed to merely a convenient means of achieving [the government's] interests." *Thompson*, 122 S. Ct. at 1507.

Thompson applies and the TCPA fails its constitutional test.

V. The TCPA Prohibits Communications Based on Established Business Relationships and Makes Unclear the Scope of Continued Permissible Communications with Existing Customers.

The TCPA defines an "unsolicited advertisement" as a fax advertisement sent to any person "without that person's prior express invitation or permission." This vague definition does not address a number of issues that arise in the course of day to day business: What exactly constitutes "prior express invitation or permission"? Must permission be obtained for

each fax advertisement sent, or is an initial grant of permission sufficient for continued communications? Does an existing business relationship satisfy the permission requirement? Can the permission requirement be waived by a course of conduct establishing that the recipient has acquiesced in the continued receipt of unsolicited advertisements? Can a business that has permission to send faxes regarding one product send advertisements for a new product without violating the statute? These vagaries have created a chilling effect on businesses such as Amici who must divine the intent of a potential recipient who publicizes a fax number.

The uncertainties present in the TCPA are illustrated by recent orders of the Federal Communication Commission. In 1992, for example, the FCC stated it was permissible to send an unsolicited fax advertisement to a recipient with whom the sender had an established business relationship. *1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54, n. 87. Despite the usual deference accorded a federal agency charged with implementing a statute, numerous state courts across the country refused to follow the FCC's interpretive order, creating a conflict between state and federal enforcement of the same statute.

Despite overwhelming comments from businesses stating that such faxes were beneficial, the FCC recently reversed its position, stating that the existing business relationship would no longer satisfy the requirement of permission. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991,* Report and Order, 18 FCC Rcd 14014, para. 189 (2003). Under the new rules implemented by the FCC, "express invitation or permission" requires that the permission be in writing, include a signature, clearly indicate that the recipient consents to the receipt of fax advertisements, and identify the fax number to which the advertisements may be sent. *Id.* at para. 191. The FCC initially indicated that this new rule would be effective August 25, 2003; however, after a barrage of requests for a

stay or reconsideration, the effective date was extended to January 1, 2005, or the date the matter is decided upon reconsideration. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order on Reconsideration, FCC 03-208 (August 18, 2003). The FCC's delay and indecision reflects the vagueness of the statute.

Regardless, the practical effect of the new FCC rules is that if a bank communicates via fax with a mortgage broker with whom the bank has been doing business for years to advertise a new loan product, then it has violated the TCPA's no-fax provisions. Similarly, a hotel that has an ongoing relationship with a travel agent now may be found to have violated the TCPA by failing to secure permission before faxing an advertisement for reduced weekend room rates. Thus, the effect of the TCPA's prohibition on the faxing of commercial advertisements is that companies are prohibited from fostering relationships with existing customers by offering transactions that are mutually beneficial to the advertiser and the recipient. For this reason alone, the TCPA violates the First Amendment and should be struck down as constitutionally infirm.

VI. The TCPA Is Irrational Because Class Action Liability Threatens to Bankrupt Businesses Such As Amici Simply For Faxing Truthful Commercial Information.

The plaintiff's class action bar has exploited the TCPA to develop a cottage industry that plunders businesses that rely on fax advertising. As noted in Petitioner's brief, these class actions are resulting in multi-million dollar settlements and verdicts across the nation due to the TCPA's strict liability scheme, which allows monetary windfalls for plaintiffs who have suffered no real harm. The statutory fine imposed by the TCPA is $500.00 per transmission. If the recipient can prove that the sender willfully and knowingly violated the statute, the fine can be increased to $1,500.00 per transmission. Trial

attorneys are now routinely filing putative class action suits for every unsolicited fax transmission their clients or they personally receive in the hopes that they will hit the jackpot and catch an advertisement that was sent to a large class of recipients by a deep pocket defendant.

These class action lawsuits pose a significant risk to businesses nationwide. Even worse, the impact of these suits on the financial services industries presents a very real risk of undermining the nation's economy. Surely, Congress did not intend to cause the potential collapse of hotel chains or FDIC-insured banks merely for sending time-sensitive information regarding the availability of financial products or hotel rooms. Ironically, if such businesses fail or are severely crippled, the TCPA will serve to cost the public much more than it saves in paper and toner.

CONCLUSION

The decision by the Eighth Circuit is an erroneous departure from this Court's *Central Hudson* jurisprudence. That flawed decision, and the Act it upholds, deprives a vast array of mainstream businesses from using a unique and immeasurably valuable tool of commercial communication. It deprives non-objecting recipients of unsolicited faxes of their constitutional right to receive valuable, time sensitive information that they need to make intelligent decisions in fluctuating markets. It not only wreaks these constitutional injuries, but also inflicts dire financial consequences on the businesses unlucky enough to be faced with the Hobson's choice—if they are even aware of the TCPA—of advertising through the medium they require to do business, or violating a strict liability federal statute that subjects them to multi-million dollar judgments.

For the reasons stated herein and in Fax.com, Inc.'s Petition for Writ of Certiorari, this Court should grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the Eighth Circuit.

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